

[Dias-Robainas v. Florida Power & Light](#), 92-ERA-10 (ALJ Oct. 29, 1993)
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Date: Oct. 29, 1993
Case No.: 92-ERA-10

In the Matter of

REGINO R. DIAZ-ROBAINAS
Complainant,

v.

FLORIDA POWER & LIGHT COMPANY
Respondent.

Appearances:

Robert E. Weisberg, Esq.
For the Claimant

James S. Bramnick, Esq.
Paul C. Heidmann, Esq.
For the Respondent

Before:

ROBERT G. MAHONY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under section 210 of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1982), (hereinafter called the Act), which prohibits a Nuclear Regulatory Commission (NRC) licensee from discharging or otherwise discriminating against an employee who has engaged in activity protected under the Act.

STATEMENT OF THE CASE

On August 11, 1991, Complainant, Richard Robainas, filed a complaint with the Secretary of Labor, which was subsequently

1991, respectively. The complaint, as amended, alleges that he was discharged and harassed by Respondent, Florida Power and Light (FPL), for advocating certain projects that he believed were critical to nuclear safety, for filing an internal safety complaint with Respondent's internal employee concerns program, SPEAKOUT, on May 2, 1991, and for filing a complaint with the Nuclear Regulatory Commissioner (NRC) in August, 1991.

Complainant contends that the retaliation included the following actions: (1) poor performance evaluations, (2) more frequent performance evaluations, (3) a requirement that he submit to a fitness-for-duty psychological evaluation, and (4) discharge on August 19, 1991, for refusing to see the psychologist.

Respondent denies Complainant's allegations and argues that Complainant has not met his burden of establishing a *prima facie* case. Respondent asserts that its actions toward Complainant were not motivated, even in part, by any allegedly protected activity of the Complainant, that it has articulated legitimate, nondiscriminatory reasons for evaluating Complainant on July 30, 1991 giving him a 90% rating, and that it has given valid reasons for directing Complainant to present himself for a fitness-for-duty evaluation.

On October 31, 1991, following an investigation, the Department of Labor (DOL), Employment Standards Administration, Wage and Hour Division concluded that no violation of the Act had occurred. (RX 32).1/ On November 4, 1991, Complainant filed a timely telegraphic request for a hearing pursuant to 29 C.F.R. § 24.4 (d)(2).2/ A formal hearing was held in Miami, Florida on June 9, 10, 11, and 12, 1992. At the conclusion of the hearing the parties were granted leave to submit proposed findings of fact and conclusions of law which were filed on November 3, 1992 for the Respondent and November 9, 1992 for the Complainant.

SUMMARY OF THE EVIDENCE

Complainant, who has a Bachelor's of Science degree in Electrical Engineering from the University of Miami and a Master of Science in Electrical Engineering from Florida Atlantic University, began working for FPL in July, 1980. Upon being hired, Complainant initially worked at the Company's power plant in Fort Lauderdale, Florida, in order to become familiar with its generating facilities. TR 43. Three months later, Complainant began working on projects related to the St. Lucie and Turkey Point Nuclear Power Plants. TR 43-44. From that point on Complainant was primarily engaged in work related to FPL's nuclear generating facilities. TR 44.

1/ The following abbreviations will be used as citations to the record: CX-Complainant's exhibit; RX-Respondent's exhibit; TR-Transcript of the hearing.

2/ The parties effectively waived the requirement in 29 C.F.R. § 24.6(b)(1) that specifies the Secretary of Labor shall issue a final order within 90 days of the complaint by agreeing to have the hearing in June so that each side had adequate time to prepare.

Complainant worked at FPL's General Office in Miami until June of 1982 when the Engineering Department was moved to Juno Beach, Florida. TR 43-44. The Company's Juno Beach offices then became the central location for nuclear engineering. TR 44.

In 1982, Complainant was promoted to Associate Engineer. TR 44. Thereafter, he was promoted to Engineer II and Engineer I. TR 44-45. Complainant became Lead Instrument and Control (I&C) Engineer for the St. Lucie plant in 1985.3 TR 44-45. His office, however, remained in Juno Beach. TR 45.

Complainant worked as the Lead I&C Engineer at the St. Lucie Plant until May of 1987. TR 46. In 1987, Complainant had colon surgery and back surgery, and he could not continue as Lead

Engineer. TR 46-47. After a lengthy hospitalization and recovery period, Complainant returned to work and was assigned to the Turkey Point group to work as an engineer. TR 46-47. He remained at the Juno Beach offices. TR 47.

Complainant received written performance evaluations annually while employed by FPL. TR 47; RX 1, 15. The performance appraisal form used by the company is divided into a number of categories in which employees are evaluated, including job knowledge, organization and planning, cooperation, and dependability. TR 47; RX 1. Employees are rated in each category and also in overall performance on a range of 70% to 120% which is the highest performance rating. TR 150; RX 1 at p. 2.

The performance appraisal form was revised in 1982. RX 1 at p. 9. Beginning in 1982, the performance level of employees was evaluated on a scale of 80% to 120%. TR 48; RX 1 at p. 10. An 80% rating means that the employee frequently falls short on assignments and immediate improvement is necessary. A 90% rating indicates that the employee occasionally falls short on assignments and a need for specific improvement exists. A 100% rating equates to solid overall performance. A 110% rating indicates that the employee's performance level is above the requirements for the position. On the performance appraisal, a 100% rating is a good or normal rating; and a 110% rating is above average. TR 48. RX 1 at p. 10

3/ I&C determines how equipment is to behave under different circumstances. TR 45.

Complainant received his first performance appraisal in October of 1980, which covered his three month training period at the Fort Lauderdale power plant TR 143, 145; RX 1(A). He received an overall performance rating of 110% which is above average. TR 143; RX 1 at p. 4. In the individual categories, Complainant received his highest rating, 120%, in the job knowledge category. TR 143; RX 1 at p. 2. Throughout his employment with FPL, Complainant typically received his highest

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ratings in the technical/job knowledge category. RX 1, 13, 15, 18, 21. Complainant received 90% ratings in two categories: judgment, and organization and planning. TR 143; RX 1 at p. 2.

The comments on the review with respect to those categories indicated that Complainant sometimes reached hasty and unsound conclusions and occasionally failed to fully plan his actions before doing a task. TR 143-144; RX 1 at p. 2. The review also indicated that Complainant needed to listen to instructions more carefully before starting an assignment. TR 144; RX 1 at p. 4.

At the review session, Complainant agreed that he was disorganized at times. TR 144; RX 1 at p. 4. Complainant's 1980 review was completed by his supervisor at the time, Jim Coakley. TR 143; RX 1 at p. 1.

Complainant's first annual review was completed in June of 1981 by his then supervisor, Jim Osborne. TR 144-145; RX 1(B).

Complainant received an overall rating of 100% on that review. TR 145; RX 1 at p. 8. With respect to the individual categories on the review, Complainant received a 100% rating in job knowledge and 90% ratings in both judgment and cooperation. TR 146; RX 1 at p. 6. In the section of the review dealing with areas for improvement Mr. Osborne stated, among other things, that Complainant needed to take time to assure himself that he had all the facts on a particular situation before proceeding. TR 146; RX 1 at p. 8.

Complainant received his next review in January of 1983. RX 1(C). Mr. Osborne completed the review. TR 147-148; RX 1 at p. 9. Complainant received an overall performance rating of 100%. TR 148; RX 1 at p. 12. In the section of the appraisal form dealing with areas for improvement Mr. Osborne noted that Complainant's weakest area was his reluctance to accept responsibility for larger projects in the department, but he was to be given the opportunity to take on more responsibility and

review, complex projects. TR 148; RX 1 at p. 12. On the 1983
1 Complainant was commended for his technical knowledge which
helped him in analyzing several control problems. TR 148; RX
rating at p. 12. Although Complainant received a 100% overall
and no 90% ratings in any individual category, he did not
agree with the appraisal. RX 1 at p. 12. Complainant felt that

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148- he had worked harder than was indicated on the review. TR
149; RX 1 at p. 12. At that point in time, Complainant had
not raised any nuclear safety concerns. TR 149.

Osborne Complainant's next evaluation was completed by Mr.
in 1984. TR 149; RX 1(D). Complainant received an overall
performance rating of 100%. TR 149; RX 1 at p. 16. On the
ability. review, Complainant was complemented for his technical
with TR 149; RX 1 at p. 16. In the section of the review dealing
to areas for improvement Complainant was advised that he needed
responsibility improve his acceptance of projects requiring more
and additional travel. TR 149; RX 1 at p. 16.

in Complainant's next review was completed by Mr. Osborne
January of 1985. TR 150; RX 1(E). Complainant received an
average overall performance rating of a 110% which is an above
appraisal rating. TR 150; RX 1 at p. 20. In the section of the
that dealing with areas for improvement Complainant was advised
he could improve in problem analysis. RX 1 at p. 20. Mr.
draw a Osborne stated that Complainant was sometimes too quick to
150- conclusion before the problem was completely analyzed. TR
151; RX 1 at p. 20.

in Osborne again completed an annual review on Complainant
on February of 1986. TR 151; RX 1(F). The reviewing supervisor
Smith the appraisal was Dave Smith. TR 151; RX 1 at p. 21. Mr.

and had also been the reviewing supervisor on Complainant's 1981
1982 reviews. TR 984-985. On the 1986 review, Complainant
received an overall performance rating of 110%. TR 151; RX 1
at p. 24. Mr. Smith was a managerial employee and the technical
expert in the department, and he had the final say on
technical issues and differences of opinion which arose in the
electrical and I&C disciplines. TR 52, 84, 563, 629, 953, 971, 983,
984, 991.

Complainant's next review was completed by Mr. Osborne
in February of 1987. Tr 151-152; RX 1(G). Mr. Smith was one of
the reviewing supervisors who signed the appraisal. TR 151-152;
RX 1 at p. 25. Complainant's overall performance rating decreased
to 100%. TR 152; RX 1 at p. 28. With respect to the individual
categories assessed, Complainant received a 90% rating in
cooperation. TR 152; RX 1 at p. 27. Mr. Osborne commented
in that category that Complainant "sometimes resists specific
administrative or technical work direction." TR 152; RX 1 at
p. 27.

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In the section of the review dealing with areas for
improvement, Mr. Osborne wrote that Complainant needed to
improve his negotiating skills so that he would be able to influence
others to proper courses of action. TR 152; RX 1 at p. 28.
While pointing out that his single strongest qualification
was his awareness of technical requirements and anticipating
plant needs, the section dealing with improvement also indicated
that when a course of action was determined Complainant needed to
improve his ability to support the course of action to a
successful conclusion. TR 153; RX 1 at p. 28. Although
Complainant received a 100% overall rating, he was
dissatisfied with the appraisal, feeling that he had performed better than
it indicated. TR 152; RX 1 at p. 28. At that point in time,
Complainant had not raised any nuclear safety concerns. TR
153.

Complainant's next performance review was in February of 1988, and it was again completed by Mr. Osborne. TR 153; RX 1(H). Complainant received a 100% overall performance rating, a 100% rating in the category of technical/job knowledge, and a 90% rating in organization and planning. TR 153-154; RX 1 at pp. 30-32. The comment in that category stated that Complainant needed to develop the customer need before making his work plans. TR 153-154; RX 1 at p. 30. Complainant also received a 90% rating in the dependability category. TR 154; RX 1 at p. 31. In the comment section of that category, Mr. Osborne indicated that although Complainant completed most of his projects on time, he did not exhibit a dependable attitude in other aspects of the job. TR 154; RX 1 at p. 31.

Cooperation was another category in which Complainant received a 90% rating on his 1988 review. RX 1 at p. 31. The comment in that category indicated that Complainant needed improvement in working with management and the customer. TR 154; RX 1 at p. 31. Complainant also received a 90% rating in the quality category. RX 1 at p. 31. With respect to that category, Mr. Osborne stated that Complainant did not use the quality improvement process techniques in his daily work. RX 1 at p. 31. In the section of the review dealing with areas for improvement, Mr. Osborne noted that Complainant had a negative attitude about

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various aspects of his job which often affected his work. TR 154; RX 1 at p. Complainant believed that his 1988 review was unfair. TR 154-155; RX 1 at p. 32. At that point in time, Complainant had not raised any nuclear safety concerns. TR 154.

Complainant was again evaluated by Mr. Osborne in February of 1989. TR 155; RX 1(I). Once again, Mr. Smith was one of the reviewing supervisors. TR 155; RX 1 at p. 33. Carl Bible also signed the review as a reviewing supervisor. TR 155; RX 1 at p. 33. Mr. Bible has performed nuclear engineering work for the

Company since 1981. TR 946. On the 1989 appraisal
Complainant received a below average 90% overall performance rating. TR
48- 49, 155; RX 1 at p. 36. At that point in time Complainant
had not raised any nuclear safety concerns. TR 155-156.

With respect to the individual categories assessed,
Complainant received 100% ratings in technical/job knowledge
and also in dependability, but received below average 90% ratings
in the other four categories, namely initiative,
judgment/problem analysis, organization and planning, and cooperation. TR 156;
RX 1 at pp. 34-35. In the initiative category, Mr. Osborne
commented that Complainant was confronted on several
occasions for using his work time to do homework related to outside
classes he was taking. RX 1 at p. 34. In the judgment/problem
analysis category, Mr. Osborne commented that Complainant's lack of
judgment was shown by the fact that he stopped working on an
important power supply analysis to begin unimportant work
without approval. RX 1 at p. 34. In the organization and planning
category, Mr. Osborne commented that Complainant exhibited a
lack of interest in meeting department objectives. RX 156; RX 1
at p. 34. In the comment section of the cooperation category, Mr.
Osborne noted that Complainant's lack of teamwork had been
observed in various areas. TR 156-157; RX 1 at p. 35.

On the 1989 review, Mr. Osborne noted that
Complainant's strongest single qualification was his technical ability. TR
157; RX 1 at p. 36. With respect to Complainant's principal
areas for improvement, Mr. Osborne commented that
Complainant's negative attitude and lack of dedication to his work was

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affecting his technical ability and that management
would discuss that with him. TR 157; RX 1 at p. 36. In the
employee reaction section of the appraisal form, Mr. Osborne
noted that Complainant was not pleased with the appraisal and
that Complainant was not willing to discuss the review
although Mr. Osborne tried to discuss it with him on several
occasions. TR 157-158, 986-987; RX 1 at p. 36.

February Complainant was again reviewed by Mr. Osborne in
appraisal of 1990. TR 159; RX 1(J). Mr. Bible signed the 1990
received as a reviewing supervisor. RX 1 at p. 37. Complainant
40. He an overall performance rating of 100%. TR 159; RX 1 at p.
 was credited for questioning the Westinghouse setpoint
 methodology so FPL would receive a more useful product. His
problems strongest quality was persistence in understanding the
the in order to arrive at the best solution. In the section of
Osborne appraisal form dealing with areas for improvement, Mr.
 commented that Complainant needed to work on improving his
40. dedication to certain work requirements. TR 159; RX 1 at p.
1 Complainant was satisfied with the appraisal. TR 53, 160; RX
was at p. 40. Upon the recommendation of Mr. Smith, Complainant
RX 1 promoted to a Senior Engineer position. TR 50-51, 160, 987;
 at p. 41.

 In September of 1988, the Engineering Department was
split between the fossil and nuclear engineers, and a Nuclear
the Engineering Department was created. TR 654, 656. In 1990,
 Nuclear Engineering Department was restructured. TR 655-656.
Company's Prior to the restructuring, approximately 80% of the
 nuclear engineering work was done by outside contractors,
EBASCO. including architect/engineering firms such as Bechtel and
 TR 162, 656. The Company decided to do more of the
engineering work itself rather than relying on outside firms. TR 162,
656. Separate Production Engineering Groups (PEG) and Outside
Services Management (OSM) groups were created for both the St. Lucie
and Turkey Point Power Plants. TR 656. The PEG groups were the
 groups where the actual design work would be done, and these
 groups worked out of the offices of the outside engineering
the firms. TR 656-657. Bechtel did most of the design work for
 Turkey Point Plant. TR 657. Therefore, the Turkey Point PEG

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 group was assigned to work out of Bechtel's offices which
were

located in the RCA Building in Palm Beach Gardens
(approximately
three miles from the Company's Juno Beach offices). TR 103,
133,
135, 418, 432. 541, 657, 757, 1001-1002; CX 74: In
connection
with the 1990 reorganization many engineers in the Nuclear
Engineering Department were assigned to one of three groups:
Staff group, PEG, or OSM. TR 162, 169-170. Complainant was
assigned to the Turkey Point OSM group on approximately
September
17, 1990. TR 60, 913. Bob Wade was the Manager for the
Turkey
Point OSM group. TR 657; RX 3.

In February of 1991, Complainant was transferred from
the
OSM group to the PEG group for the Turkey Point Plant. TR
173-
174, 630, 658, 955; RX 3. Thereafter, Complainant worked out
of
the Bechtel offices in the RCA Building. TR 84-85, 432, 757.
Complainant felt that this transfer was premature because his
projects were still in progress. TR. 77. According to Bob
Wade,
Complainant was transferred because he was better at the
outside
technical engineering aspects of his job than managing
contractors in the OSM Group. He also indicated that
Respondent
never intended to assign Complainant to that group
permanently.
TR. 912. According to David Smith, chief electrical I & C
engineer for the Nuclear Division, Complainant was
transferred to
PEG because his tasks in OSM were essentially complete. He
further stated that Complainant was scheduled to move out of
that
area at some point, and "everyone pretty much went through
OSM on
their way to PEG." TR 992.

In the Turkey Point PEG group there was an electrical
and
I&C group headed by Mr. Bible. TR 658, RX 3. Basil Pagnozzi
was
the I&C Lead who reported to Mr. Bible. TR 658; RX 3. Mr.
Pagnozzi was assigned to the PEG group in March of 1990. TR
548.
He became a supervisor in June of 1990. TR 630. This was
Mr.
Pagnozzi's first supervisory assignment with the Company. TR
549.

Upon transferring to PEG, Complainant's supervisor was
Mr.

point in Pagnozzi. TR 91, 132, 195-196, 542, 994; RX 3. At that
time, Mr. Pagnozzi reported to Mr. Bible. TR 196; RX 3. Mr.
Bible in turn reported to Pat Higgins, who was the manager of
the

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Turkey Point PEG group. TR 196, 657; RX 3.

Effective June of 1991, a further organizational change
occurred. TR 659; RX 4. The electrical and I&C areas were
split into separate groups. TR 659; RX 4. Mr. Bible headed
the
electrical area, and Mr. Pagnozzi headed the I&C area. TR
656,
971; RX 4. After that change, both Mr. Bible and Mr.
Pagnozzi
reported directly to Mr. Higgins. RX 4. Complainant
continued
to work in Mr. Pagnozzi's group until his termination in
August
of 1991. TR 91, 131, 133, 542.

On February 20, 1991, Complainant was given a 1990
annual
performance review by Bob Wade which covered the period from
February, 1990 through February, 1991. Bob Wade had been
Complainant's supervisor since October, 1990. The review
gave
Complainant a 90% overall rating. Bob Wade testified that
although he solicited input from both Mr. Osborne,
Complainant's
supervisor for most of the period under review, and Mr.
Bible,
Complainant's second line supervisor, he only received input
from
Mr. Bible. TR. 161, 930-931, 956.

In his input, Mr. Bible gave Complainant a high rating
in
technical/job knowledge and a lower rating in cooperation.
In
the review, Mr. Wade rated Complainant's technical/job
knowledge
skills at 90%, stating that Complainant failed to complete
his
assignments on schedule. Under judgement/problem analysis
Mr.
Wade commented that "Richard generally reaches a solution for
a
given problem but overlooks other options which may have less
impact on the overall project." He also gave Complainant a
90%
rating in cooperation. Under cooperation he stated that
"Richard
needs to entertain the opinions of others-particularly his

supervisor." CX 8.

Bob Wade also commented that "Richard is not qualified
nor oriented toward production engineering." CX 8. In his
testimony he explained that Complainant's forte, technical engineering
work, would be strengthened in the production
engineering group. He also stated that ". . . [Complainant]
was not able to manage the other contractors and was too involved
in

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the technical details." TR 924.

The review was presented to Complainant by Mr. Wade and
Mr. Bible. Carl Bible testified that Complainant's reaction was
negative, and he left the room without signing the review
stating that he would request that higher management review his
evaluation. Complainant brought the matter to his PEG
supervisor, Basil Pagnozzi. Mr. Pagnozzi recommended that
Complainant appeal his review to Mr. Hosmer on the basis that
he did not work for Mr. Wade during the whole year covered by
his review. TR. 552.

On February 23, 1991, Complainant sent a seven-page
letter to Mr. Hosmer complaining about the evaluation he received
from Mr. Wade. In the letter Complainant stated in part:

"My recent annual performance review given
by Mr. Bob Wade in the presence of Mr. Carl Bible
distorted my true performance representing at one
level, retribution for my commitment to projects
that I considered critical for the nuclear safety
of Turkey Point and which Msrs. Wade/Hale, for
budgetary or other reasons, clearly opposed
. . . ." CX 9.

In his letter Complainant cited his accomplishments for
the year to support his contention that the February 1990/1991
review was inaccurate and unfair. He also asserted that the review
represented a continuation of a pattern by FPL management to
discriminate against him because he is a Cuban American. He
stated that the review violated procedural requirements
because he was not evaluated by all supervisors for whom he had
worked

his during the year and that the review was in retaliation for
protest of the random drug/alcohol testing.4/

performance Prior to receiving Complainant's letter of February 23,
1991, Mr. Hosmer had nothing to do with Complainant's
reviews, and he had no knowledge of Wade's appraisal of
Complainant before the appraisal was given to Complainant.

TR 670. Upon receiving Complainant's letter, Mr. Hosmer took
the matter very seriously because he felt Complainant was asking
him for help. TR 671.

in 4/ Complainant had objected to taking a mandatory drug test
Duty" March, 1990. He wrote: "I am attending this "Fitness for
session as a result of coercion under threat of losing my
employment. I regard this program as a basic violation of my
human constitutional rights. I intend to seek redress
against the Company and all agencies responsible for this program the
day when we begin to live as a democratic society that respects
individual rights. (C-3)

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to When Mr. Hosmer received Complainant's letter, he asked
Mr. Harry Paduano, manager of the Juno Staff Engineering Group,
investigate the fairness of Complainant's review. TR. 672.
to Paduano asked Dave Smith to meet with Mr. Bible and Mr. Wade
Bible determine if Complainant's review was fair. Smith met with
and Wade who together reevaluated Complainant, assessing his
performance category by category for the entire year. TR
994- 995.

was Subsequently, on March 8, 1991, Complainant Robainas
and given a revised annual evaluation by supervisors Dave Smith
Carl Bible and was again rated 90%. Mr. Bible rated
Complainant 100% for the first eight months, and Mr. Wade rated
Complainant 80% for the last four months. Mr. Smith testified that when
he

room gave Complainant the revised review, he stood up, left the
without discussing the review, and went home sick. TR. 996.

On March 15, 1991, Mr. Hosmer called a meeting with
Complainant at which he advised him that a third performance
review for 1991 would be prepared and that the review would

be based on the 9 month period during which he was under Carl
Bible's supervision. Mr. Hosmer advised Complainant that he
would be given the rating Carl Bible had given him, 100%.

Mr. Hosmer testified that he changed the review because he
expected some engineers would struggle with the transition from
technical engineering work to production engineering, and he would give
Complainant a new start. He also told Complainant that he
was placing him on an accelerated evaluation schedule of monthly
performance reviews. Mr. Hosmer testified that he did not
look at Complainant's personnel file until after his March 15,
1991 meeting with Complainant. TR 676, 709.

Mr. Hosmer testified that during the meeting he and
Complainant discussed the amount of stress that Complainant
was under. According to Mr. Hosmer, Complainant told him that he
was

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under a tremendous amount of stress because he was taking
night classes for his master's degree, and his in-laws were moving
to Florida. Mr. Hosmer testified that he recommended that
Complainant find some way of handling his stress, either
through exercise or through talking with someone in the Employee
Assistance Program (EAP). TR 675-680.

Complainant denied complaining to Mr. Hosmer about
being under stress, and stated that he told Mr. Hosmer that
everything was going extremely well in his life. Complainant testified
that

he mentioned that the outage period⁵ had been a very tough
period with a lot of challenges, but he denied telling Mr.

Hosmer that the job was getting to him. According to Complainant,
Mr.

Hosmer never mentioned jogging or going to EAP.
Complainant's

5/ The outage period involves the periodic shut down of nuclear power units.

doctor, Allen Birnbaum, who is board certified in internal medicine stated that Complainant never mentioned that he was under stress or any specific stress that he might have in his life. He did mention that he recommended that Complainant

cut

back on smoking and drinking cuban coffee. CX-77.

Mr. Hosmer's notes from the March 15, 1991 meeting, his third one-on-one with Complainant, stated:

I again counceled [sic] him to find a more constructive avenue for adjudicating performance or policy issues than letters (eg no more ltrs). (John Barrow, omnsbudsman [sic] will visit him next week to discuss EAP). He again agreed.6/

(RX 37)

Allegations of Safety Concerns

Complainant alleged that for budgetary reasons FPL management opposed certain projects which he alleged were related. RX 12 at p. 1; RX 29 at p. 9. FPL states that, on

safety-
the

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contrary, Mr. Goldberg, Mr. Hosmer, Mr. Smith, and Mr. Wade all testified that a nuclear safety issue would always take precedence over budget and schedule. TR 664, 831, 833, 919, 1001. Mr. Goldberg testified that although budget and schedule are important, the Nuclear Division's "primary and most focused concern is that of nuclear safety." TR 831. Mr. Homer testified that nuclear safety is "the most important thing we deal with." TR 664. Mr. Smith testified that despite budget and schedule, "[w]e would [make] sure that nuclear safety was not compromised." TR 1001. Mr. Wade also testified that regardless of budget and schedule, "[t]here is never any compromise on [nuclear safety]." TR 919. Similarly, James Hardy, an engineer in the I&C Department at the Turkey Point Plant, and a friend of Complainant, testified that he has never felt pressure from supervision to make decisions based solely on cost and schedule,

safety and that he has never witnessed any supervisor compromise
in the interest of cost and schedule. TR 408-409.

Goldberg Mr. Goldberg was hired by FPL in the spring of 1990 as
president of the Nuclear Division. TR 825. When Mr.
"troubled" came to FPL, the Turkey Point Plant was considered a
"watch" plant" by the NRC. TR 826. The plant was on the NRC's
list," and was subject to frequent surveillance by the NRC.
TR 826. In December of 1991, the NRC issued an inspection
report based on its evaluation of the plant from August 1, 1990
through September 28, 1991. RX 64. That time period covers much of
the time Complainant was allegedly concerned about plant safety.
The report stated that superior performance had been attained by
the

6/ This memo also referenced the prior counselling sessions.

plant in the following areas: plant operations, emergency
preparedness, security, outage, and safety assessment/quality
verification. RX 64 at p. 1. The report also stated that
performance improvement had been demonstrated in the areas of
radiological controls and maintenance/surveillance. TR 64 at

p.

1. The report concluded as follows:

The assessment indicates that overall Turkey Point's

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performance continues to improve Your managers
and staff are to be commended. RX 64 at p. 1.

going When the OSM group was formed, there were several on-
To projects being performed by outside contractors. TR 912.
engineer maintain continuity on those projects, FPL assigned the
(TR with the most involvement on those project to the OSM group.
primarily 912) Complainant was selected because he was working
912. on the Westinghouse set point study for Turkey Point. TR
are Set points are operational limits on plant equipment which

plant not to be exceeded. TR 63-64. There is equipment in the
light which performs a function similar to an oil gauge warning
in a car which only comes on when the oil pressure is low.
TR 988. Set points determine the point at which certain
equipment in the plant is activated. TR 988.

any Upon completion of the Westinghouse setpoint project,
new setpoints would be incorporated into the technical
specifications of the plant. TR 64. The new technical
specifications would have to be submitted to the NRC for
approval. TR 64, 190-191. As a project manager in the OSM
group, Complainant was responsible for several I&C projects
including the Westinghouse setpoint project. TR 913.

Rosemont, In the fall of 1990, an issue arose with respect to the
transmitters. TR 913. Prior to the dual-unit outage,
an a manufacturer of pressurizer pressure transmitters, issued
transmitters. industry-wide notice advising of a problem with its
its TR 174, 913-914, 1007. FPL had some of the transmitters at
Turkey Point Plant. TR 913. Accordingly, the Company had to
also determine what to do to correct the reported problem which
involved setpoints. TR 914. Complainant recommended that the
other transmitters be replaced. TR 914, 990. Mr. Wade felt that
to options had to be explored before a recommendation was made
there the plant. TR 914-915. With respect to the transmitters,
alternatives was a meeting held between Mr. Wade, Complainant, and other
engineers. TR 915. At the meeting other potential
the were discussed such as changing the calculations or modifying
existing transmitters. TR 915. There was also a question of
possible whether Rosemont's analysis was valid. TR 915. It was

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the that nothing had to be changed. TR 915. The consensus at
only meeting was that other alternatives had to be explored, if
to rule them out, because any recommendation to replace the
transmitters would have to be explained to the people at the
plant. TR 916, 991. Mr. Smith, the department's technical

expert, agreed that all other options had to be explored before a decision to replace the transmitters could be made. TR 990-991.

Although professional differences of opinion are a day to day occurrence in the department, Mr. Wade and Mr. Smith both felt that Complainant had prematurely reached his conclusion that the transmitters should be replaced. TR 67, 914, 916, 990. Ultimately, the transmitters were replaced. TR 941-942, 954, 977, 991.

In the fall of 1990, Complainant was also working on the emergency response data acquisition and display system (ERDADS) isolation project. TR 62. That project involved making sure that the control room operators of the plant received accurate information on the condition of the plant in the event of an accident. TR 64-65. Complainant testified that he had a disagreement with Mr. Wade concerning the ERDADS project. TR 188; RX 12 at p. 4. The issue was whether to use a phased approach to complete the project because the Company was having difficulty obtaining certain equipment from the vendor. The discussion involved whether FPL could obtain some of the equipment in 1990, do some of the work at that time, and then complete the project in July of 1991. The Company decided to proceed with the project in phases. TR 917.

Mr. Wade testified that he did not recall any particular discussion or disagreement with Complainant on the issue. TR 917-918. Mr. Bible and Mr. Smith both testified that there was nothing unique about the ERDADS issue--that such issues arise all the time in the department. TR 955, 991.

Complainant called as a witness Mr. Efren Tio who is employed by FPL as a Senior Engineer. TR 361. Mr. Tio testified that he attended a number of meetings in 1990 and 1991 which Complainant also attended. TR 366-367. Complainant testified that Mr. Tio attended meetings where there were disagreements on the pressurizer pressure transmitters. TR 180. Tio stated that

the there were differing opinions on technical matters at all of
meetings--that there was nothing unusual about that. TR 367,
371-373. Complainant testified that in the nuclear power
technical industry there frequently are heated disagreements on

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issues, and sometimes those disagreements are "very healthy."
TR 180.

Approximately every two weeks, Mr. Wade held a meeting
of the OSM group to review the status of projects assigned to
the engineers. TR 920. Representatives from the contracted
engineering firms such as Bechtel, Westinghouse, and EBASCO
attended those meetings as well as the OSM project managers.
Budget and schedule were discussed at those meetings.
Additionally, the status of each project was reviewed as well
as what was being done to solve any problems which may have
occurred. One such biweekly meeting was held in December of
1990. Several of Complainant's projects were behind
schedule.
Mr. Wade criticized the projects on which Complainant was
working and raised his voice to Complainant. Mr. Wade had also
criticized the performance of other engineers and raised his
voice to them. Complainant testified, however, that Mr. Wade
had never used obscenities before. With respect to Complainant's
that projects being behind schedule, Complainant did not contend
183, the delays had anything to do with nuclear safety. TR 181-
920-922.

On December 18, 1990, Complainant attended a meeting of
the Company Nuclear Review Board (CNRB). TR 190; RX 8. Mr.
Hosmer who is a member also attended. TR 194, 668, 719. The CNRB
is comprised of high-level executives of the Company's Nuclear
Division. It meets periodically to consider items which
impact on nuclear safety. TR 71, 719. At the December meeting
Complainant made a presentation on the Westinghouse setpoint
submitted methodology and the proposed licensing amendment to be
to the NRC by the Company. The CNRB approved the submittal.
TR 190-191, 668; RX 8 at p. 3. At the meeting, Ken Harris, a
Company Vice President, requested that Complainant train

employees of the Nuclear Division in the new setpoint methodology. TR 70-71, 72, 191, 668-669. Complainant considered the setpoint training to be important and necessary work. TR 193.

Complainant testified that his presentation to the CNRB and

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its approval of the setpoint methodology was a significant milestone in his work in the OSM group. TR 193-194, 993.

From an engineering standpoint, some of Complainant's other projects were also coming to a close. TR 923. The design packages being managed by Complainant were being delivered to the site to be implemented, which was the responsibility of other departments such as the Construction Department, but not the Engineering Department. TR 923. Additionally, OSM's workload in general was declining. TR 923.

With respect to Complainant's work performance in OSM, his supervisor was of the opinion that he was not satisfactorily accomplishing the project engineering aspects of his work, and was not able to manage other contractors. He was also of the view that Complainant was too involved in the technical details of the projects. The Nuclear Engineering Department had a group that did technical work, *i.e.*, PEG. Mr. Wade believed that if Complainant's performance was going to return to a satisfactory level, he needed to return to a production engineering environment. Mr. Wade also believed that Complainant would perform better in PEG than he had in OSM because PEG actually did technical engineering work instead of managing the work of outside contractors. Accordingly, Mr. Wade recommended to his superior, Steve Hale, Engineering Project Manager, that Complainant be transferred to PEG. TR 194, 923-924.

Mr. Hale and Mr. Wade then met with Complainant and told him that he was going to be transferred to PEG. TR 194, 923. At the meeting Wade mentioned to Complainant that he had reached a

major milestone in his OSM work--the CNRB presentation and approval. TR 77-78, 194-195. Wade also advised Complainant that he would still be used to provide technical support to OSM even after he was transferred to PEG. TR 195, 928-929; RX 10. Complainant was transferred to PEG effective February 1, 1991. TR 76, 78; RX 10.

In mid-April, 1991, Mr. Pagnozzi assigned a project known as the Volume Control Tank (VCT) setpoint calculation to Complainant. TR 108, 558. Mr. Pagnozzi told Complainant to do a

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calculation to determine if the Company needed to make any setpoint changes in connection with the replacement of certain transmitters in the tank. TR 108, 559. Those transmitters measured the level of borated water in the tank. TR 108, 559. Mr. Pagnozzi told Complainant to dedicate three days a week to the VCT calculation. TR 241, 559, 969. Complainant responded that he was too busy on the setpoint course and answering questions related to the course. Mr. Pagnozzi told Complainant that he was not too busy with the course to do the VCT calculation, and that if employees were asking questions related to the course, he was not to spend very much time responding to them. TR 559. Complainant was not working more than two days a week on the setpoint training course during the last two weeks of April, 1991. TR 561; RX 17. Nevertheless, Complainant did not spend three days a week on the VCT calculation as he had been told by his supervisor, Mr. Pagnozzi. Instead, Complainant spent about 1 1/2 days a week on the VCT project during the last two weeks of April. TR 248-249. Mr. Bible testified, as did Mr. Pagnozzi, that he was there when Mr. Pagnozzi gave Complainant a directive to work on the VCT project three days a week--that it was not merely a suggestion. TR 241, 559, 968-969.

Complainant's first monthly performance appraisal following

his meeting with Mr. Hosmer was prepared by Mr. Pagnozzi on April 30, 1991. TR 562; RX 18. Mr. Pagnozzi prepared the review pursuant to Hosmer's directive that Complainant receive additional reviews to help provide him with feedback on his performance. TR 556, 561-562. Mr. Pagnozzi used the Company's regular performance appraisal form. RX 18. Under the Company's personnel policies, the appraisal form may be used for interim reviews and counseling. TR 530-531, 633-634; RX 60 at pp. 2, 4. Because Complainant had received the revised review prepared by Mr. Bible on March 25, 1991, this was the first monthly review, as directed by Hosmer, although it actually covered Complainant's performance for the three-month period following his transfer to PEG in February of 1991. TR 250, 563, 966-967; RX 15, 18 at p. 2. No one told Mr. Pagnozzi how to rate Complainant or what to write in the review. TR 562, 617, 619, 968.

Mr. Pagnozzi gave Complainant a 90% overall performance

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rating. TR 563; RX 18 at p. 4. With respect to the individual categories assessed on the appraisal, Mr. Pagnozzi gave Complainant a 110% rating in technical/job knowledge. TR 250, 563; RX 18 at p. 2. Pagnozzi commented that Complainant's above average rating in that category was demonstrated by his development of the setpoint methodology training course. TR 250, 563; RX 18 at p. 2. However, he gave Complainant below average ratings in three of the individual categories; organization and planning, dependability and cooperation. RX 18 at pp. 2-3.

In the organization and planning category, Mr. Pagnozzi gave Complainant a 90% rating. TR 251, 563-564; RX 18 at p. 2. In the comment section under that category, Mr. Pagnozzi stated that Complainant's lack of organizational skills resulted in him spending more than four hours after each setpoint training class reorganizing his teaching materials. TR 564; RX 18 at p. 2.

teaching Pagnozzi had observed that Complainant would return from
and a class with a full box of overhead laminates in disarray,
then spend many hours organizing the materials. TR 564. He
suggested that Complainant number the transparencies and keep
them in a binder for easy retrieval. TR 564. Complainant
refused the suggestion even though Mr. Pagnozzi tried to talk
to him about it on more than one occasion. TR 564. On
Complainant's 1980, 1988 and 1989 reviews, he had also
received 90% ratings in the organization and planning category, prior
to allegedly raising any nuclear safety concerns. TR 251; RX 1
at pp. 2, 30, 34.

Mr. Pagnozzi also rated Complainant 90% in the
dependability category. TR 252; RX 18 at p. 3. In the
comment section of that category Pagnozzi noted that Complainant did
not work on the VCT project three days a week as he had been
directed to do. TR 252, 565; RX 18 at p. 3. Complainant had
previously received a 90% rating in dependability on his 1988 review,
prior to allegedly raising any nuclear safety concerns. RX 1 at p.
31.

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TR Mr. Pagnozzi gave Complainant an 80% rating in cooperation.
commented 252, 565; RX 18 at p. 3. In that category, Pagnozzi
18 at that Complainant refused to accept management feedback on his
previous appraisal and recommendations for improvement. RX
RX p. 3. Mr. Pagnozzi also noted that Complainant's lack of
cooperation was beginning to affect his overall performance.
average 18 at p. 3. Complainant had previously received below
reviews, ratings in cooperation on his 1981, 1987, 1988, and 1991
3. most of which took place well before he allegedly raised any
nuclear safety concerns. RX 1 at pp. 6, 27, 31; RX 15 at p.
rating On page 4 of the appraisal form the overall performance
stress for this period was 90% (+) and Pagnozzi recommended that
Complainant consider seeing the EAP Coordinator "for his

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related concerns which have affected his health." TR 253; RX
at p. 4.7

7/ Mr. Pagnozzi's comment about having Complainant see the
EAP Coordinator stemmed from the following facts: on certain
days, Complainant spent nearly eight hours teaching the
class at the Turkey Point Plant. In addition, Complainant
drive from his home in Stuart to the Turkey Point Plant and
drive back home. Whenever Complainant taught the class at
Point he wanted time off the next day to compensate for it.
Pagnozzi suggested to Complainant that he travel down to
Point the day before a class or stay at a hotel near the
after teaching the class, and then drive back to the PEG
the next morning. Mr. Pagnozzi also advised Complainant that
Company could pay him overtime if he worked a long day.
Complainant rejected all of those suggestions, saying that he
needed compensatory time off. Complainant stated that
the class at Turkey Point, with the driving, was very
and very difficult. Complainant told Mr. Pagnozzi that he
not work overtime because of his health. On earlier
Complainant had told Mr. Pagnozzi that he had been operated
was taking medications for his stomach, was under a lot of
stress, and had numerous problems. TR 567-570.

Pagnozzi was concerned that perhaps Complainant had
limitation because of his health problems. Accordingly, Mr.
Pagnozzi contacted Mr. Davis and told him that he had an
who was requesting time off to rest after putting in long
because of one day assignments at the Turkey Point Plant.
Pagnozzi did not identify Complainant by name. Mr.
Davis said it sounded like something was wrong because many
employees have to travel to Turkey Point and yet report for
in Juno Beach the next morning. Pagnozzi told Davis that the
employee had told him about having had health problems in the
past and some operations. Pagnozzi asked Davis whether the
Company had to consider the condition some form of handicap

a make special allowance for it. Davis told Pagnozzi that such
needed decision could not be made by him. Instead, the employee
to see a doctor or be referred to the EAP before the Company
could make any allowance for such problems. TR 528, 568,
618, 619.

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Also, on the April 30th review Mr. Pagnozzi stated that
Complainant should complete the VCT setpoint calculation by
May 10, 1991, but he did not do so. TR 256, 568, 970; RX 18 at
p. 4.

Mr. Pagnozzi presented the performance appraisal to
Complainant at a review session held on or about April 30,
1991. TR 98, 101, 249, 570. Also present at the review session
were Mr. Hosmer, Mr. Higgins and Mr. Bible. Tr 98, 249, 561, 713,
967. Mr. Hosmer attended the session because Complainant had
asked him to get involved by writing the seven page letter to
him, and he wanted to see how Complainant was doing. TR 714.
The other people at the session were those in the chain of
command from Complainant to Hosmer. TR 249, 562, 713-714,
967.

Mr. Hosmer did not contribute to the April 30th
evaluation written by Mr. Pagnozzi. Hosmer hoped that he would find
that Complainant was doing fine, and he (Hosmer) could exit the
process. Hosmer had not established a timetable for how long
the monthly review process would last, but hoped that
Complainant's performance would improve within a month or two so that he
could end the process. He testified that the point of the
monthly reviews was to help Complainant improve his performance. TR
708, 713-714.

Mr. Pagnozzi handed Complainant the appraisal, and
tried to explain the ratings and comments. Complainant flipped to the
last page of the appraisal, looked at the overall rating,
placed the document down, looked up and quit listening to Mr.
Pagnozzi. When Pagnozzi finished going through the evaluation, comments

felt were exchanged between Pagnozzi and Complainant which Hosmer
sent had no value. Accordingly, Mr. Hosmer stopped the meeting,
him everyone out of the room except Complainant, and talked to
for about five minutes. TR 98-99, 255, 570-571, 714-717.

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What was said at the meeting between Hosmer and
Complainant is in dispute. Mr. Hosmer testified that he told Complainant
it was time to start taking the performance issue seriously,
90% reminding Complainant that four supervisors had rated him a
given performer. The four supervisors were Mr. Osborne (who had
and Complainant a 90% rating in 1989), Mr. Wade, Mr. Pagnozzi,
Mr. Smith (when he had investigated the review by Mr. Wade).
It was not merely one supervisor who was rating Complainant as a
that below average performer. Hosmer wanted Complainant to know
could the below average ratings were serious because Complainant
lose his job if his performance did not improve. Complainant
testified that Mr. Hosmer stated the important thing was not
to do his job right, but to make his immediate boss look good.
TR 99, 715.

On May 2, 1991, Complainant went to NSS which is the
Company's internal program for raising nuclear safety and any
other concerns. TR 101, 273, 438, 827; RX 54. On July 29,
1991, Complainant delivered a document to NSS, supplementing his
original concerns. JX 1 at p. 1. An updated version of the
same concerns was received by NSS on August 9, 1991. JX at p. 1.
Among other things, Complainant alleged that he was receiving
poor evaluations in retaliation for his commitment to
projects he considered critical to nuclear safety. RX 58.8 NSS
concluded investigated Complainant's concerns. JX 1 at p. 1. It
that Complainant's February, 1991 review was not completed in
accordance with FPL guidelines but was subsequently
corrected. CX 37. His other concerns were not substantiated. CX 37.
In the course of its investigation, NSS did not interview Mr.

until Hosmer, Mr. Pagnozzi, Mr. Bible, Mr. Wage, or Mr. Barrow
after August 1, 1991. JX 1 at p. 1-2. Mr. Goldberg was not
interviewed by NSS. JX 1 at p. 2.

Shortly after Complainant filed his concerns with NSS,

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James Geiger, Vice President of Nuclear Assurance, brought
the thrust of the Complainant's concerns to Mr. Goldberg's
attention. TR 436-437, 442-444, 842. In the organizational hierarchy,
Mr. Geiger reported directly to Mr. Goldberg any NSS concern
which raised serious questions about the quality of any activity in
the Nuclear Division. TR 442. Mr. Geiger orally briefed Mr.
Goldberg. TR 443. Mr. Geiger testified that he did not
believe that he mentioned Complainant's name to Mr. Goldberg. TR
443. Mr. Goldberg testified that he did not recall the
conversation. TR 842.

8/ Examples are: The reactor protection system, replacement
of pressurizer pressure transmitters, setpoint methodology and
control associates tech specs and ERDADS isolation, and volume
tank transmitter. RX 58.

In the latter part of May, Mr. Pagnozzi had a
disagreement with Complainant about the VCT calculation. TR 267-268, 573.
Mr. Pagnozzi tried on several occasions to point out to
Complainant what he felt were errors in the assumptions and
conclusions of his calculation. Complainant did not agree
that there were errors. Accordingly, Pagnozzi suggested that the
Maintenance Department at the plant be contacted about the
issue. Pagnozzi wrote a memorandum to the plant listing some of the
assumptions which he felt were critical to the calculation.
The plant replied that Mr. Pagnozzi's assumptions were correct.
TR 573-574; RX 51-52. Mr. Bible also reviewed Complainant's
calculation and recognized that it was incorrect. TR 970-
971. Mr. Pagnozzi then met again with Complainant and told him
that

his assumptions were incorrect. TR 268, 574. Complainant
did
not agree. Because the dispute involved a technical issue,
Mr.
Bible and Mr. Pagnozzi contacted Mr. Smith to resolve it. TR
574, 630, 971, 999.

Mr. Smith reviewed the calculation and conclusions, and
agreed that Complainant's calculation was incorrect. TR 574-
575,
630, 971, 999-1000. Mr. Smith told Mr. Pagnozzi and Mr.
Bible
that Complainant's calculation was incorrect because it
assumed
that a device failed high and low at the same time.
According to

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Mr. Smith, that was impossible. The device could fail high
or it
could fail low, but it could not fail high and low at the
same
time. Therefore, Complainant's calculation was incorrect.
TR
999-1000.

Mr. Pagnozzi then talked to Complainant about the
calculation. TR 574, 622. Complainant was upset that
Pagnozzi
had contacted plant maintenance and Mr. Smith. TR 574.
Complainant disagreed with Mr. Smith, Mr. Bible and Mr.
Pagnozzi.
TR 575, 971. Pagnozzi removed Complainant from the project
because the calculation had to be completed by the end of
May,
and Pagnozzi believed complainant was not going to complete
it
correctly. TR 269, 575, 621-622, 971. Mr. Pagnozzi did not
make
Complainant sign off on the project. TR 576.

With respect to the VCT calculation, Complainant
thought
that a certain setpoint should be changed in the interest of
safety. TR 109, 409. Mr. Hardy disagreed. TR 409. He did
not
feel that the suggested change was important to safety at
all.
TR 409. When Pagnozzi completed the calculation, he showed
it to
Complainant and asked him to review it and maybe reconsider
his
opposition to it. Complainant refused. TR 576, 622.
Pagnozzi's
calculation was later verified by an outside consultant. TR
269.

In addition, the NRC investigated Complainant's allegation regarding the VCT calculation in the fall of 1991. RX 35 at p. 18. Complainant's allegation was not substantiated. TR 629;

RX 35 at p. 11. The NRC stated the following:

The inspectors concurred with the FPL calculation results that indicated a change in the control setpoint in question was not necessary. [Complainant's] calculation contained unnecessary conservatism for non-safety related applications.

RX 35 at p. 11.

After Pagnozzi removed Complainant from the VCT project, he assigned Complainant to the electrical distribution system and

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functional inspection (EDSFI) file project. TR 277, 578, 623.

The EDSFI project involved an upcoming inspection by the NRC of the electrical systems at the Turkey Point Nuclear Plant. TR 277-278, 578-579. FPL had been advised that the NRC would be doing an inspection of the electrical systems in April of 1992.

TR 579, 623. The NRC was doing such inspections at various nuclear plants. TR 578-579. The inspections were very rigorous, detailed assessments of the design, construction, and maintenance of the electrical systems. TR 579.

Mr. Pagnozzi assigned Complainant the task of reviewing the audits conducted by the NRC at other nuclear power plants to determine what kind of problems were uncovered in those inspections. TR 278, 579, 623. The EDSFI project was very critical to FPL and Mr. Pagnozzi did not consider it demeaning work. However, Complainant objected to the work, saying it was outside his I&C discipline. Mr. Pagnozzi responded that the inspection reports to be reviewed covered a wide variety of topics, including I&C and electrical matters, and the information was used by FPL. TR 579.

The material to be reviewed by Complainant involved approximately twelve different nuclear plants. Pagnozzi talked to Complainant about how to organize the project because of the

large amount of material to be reviewed. He wanted
Complainant to enumerate all the violations which had been identified at
other nuclear plants. Pagnozzi told Complainant to review
the documents, write down the violations, and cross reference and
index them because there would be a lot of items. He also
told Complainant that when he finished reviewing everything a
group meeting would be held to go over the various items. The
group would determine relevancy and importance, and prioritize the
items to decide what work would be done at the plant prior to
the audit. TR 278, 579-580.

Instead of documenting the violations identified by the
NRC at other plants and indexing them, Complainant began working
on problems which he felt were directly applicable to the Turkey
Point Plant. Pagnozzi told Complainant that he was getting
ahead of the process. He told Complainant to first list the items
so

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that the department could work on the upcoming audit as a
group. Instead of doing as he was directed by Mr. Pagnozzi,
Complainant complained to Pagnozzi's supervisor, Mr. Bible. Mr. Bible
reminded Complainant that Mr. Pagnozzi was his supervisor,
and instructed him to do what Mr. Pagnozzi had told him to do.
Mr. Bible and Mr. Pagnozzi talked to Complainant, and eventually
he did the assignment as Mr. Pagnozzi had told him to do it. TR
278-279, 580-581.

A few days after the April 30th review session, Mr.
Barrow told Mr. Hosmer that the monthly evaluation process of
Complainant was not working because it was so stressful for
him that nothing was accomplished. TR 571, 716, 799. Barrow
told Hosmer that Complainant did not listen to a word during the
review session and that the process should be changed. TR
716, 799-800. Barrow also advised Hosmer that he did not feel
that there was adequate time between the reviews for Complainant
to

be make progress. TR 511. Barrow recommended that the reviews
TR quarterly instead of monthly and have fewer people involved.
in 511, 716, 800. Barrow said that if the reviews were changed
act that way, he would encourage Complainant to go to the EAP, or
stressful as his counselor himself to work on things which were
no to Complainant. TR 511-512, 716. Hosmer agreed to the
compromise offered by Barrow. TR 571, 716, 800. There was
understanding that Mr. Hosmer would not attend the quarterly
review sessions. TR 517, 716. Barrow never asked Hosmer to
remove himself from the review process. TR 799.

switch to Mr. Hosmer contacted Mr. Pagnozzi and told him to
Pagnozzi quarterly reviews of Complainant. TR 717. Hosmer asked
to remind him of when the next review was due. TR 717.

causing During this period of time, Complainant talked to Mr.
disagreement Barrow about stress in his life. TR 230, 510. One thing
following stress was the performance reviews and Complainant's
with them. Complainant also related to Barrow that the
aspects of his private life were causing stress: his or his
wife's parents were working on a house and Complainant had to
spend a lot of time working there too, and Complainant was
working on a graduate degree in electrical engineering. In
addition, Complainant told Barrow that he had to do extensive
work at the Turkey Point Plant, and thus be away from his
home.
and Barrow got the impression that Complainant was very stressed,
him. told Complainant that the EAP would be of great benefit to
TR 230, 510-512.

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weekends Mr. Pagnozzi often worked in the evening and on
1991, when Complainant was off. TR 428, 572. On one occasion in
after complainant had left work Pagnozzi looked through
Complainant's file cabinet and his desk drawers for the FPL's
only copy of the Westinghouse setpoint methodology manual.
The document was proprietary information and could not be
reproduced.
TR 572. Mr. Pagnozzi needed the document because someone had

called and asked about information contained in the document.
Complainant kept the Westinghouse document in his file
cabinet,
and had told Mr. Pagnozzi where it was. TR 426-26, 571-72,
624-
625.

After looking in the cabinet and desk, Pagnozzi was
unable
to find it. TR 572, 625. The next day, Pagnozzi asked
Complainant where the Westinghouse document was.
Complainant
responded that he had taken it home. Mr. Pagnozzi told
Complainant that the document was not Complainant's property,
and
he needed to return it to the office. TR 572, 625.

On another occasion, Mr. Pagnozzi also looked through
Mr.
Vazquez's file cabinet, trying to locate a particular file
relating to the cold chemistry laboratory. At the time, Mr.
Vazquez was out of town, and another employee had told Mr.
Pagnozzi that the file was in Mr. Vazquez's cabinet. Mr.
Vazquez
had not raised any nuclear safety concerns with NSS or the
NRC.
TR 428-29, 572-73.

Complainant testified that he did not tell Mr. Pagnozzi
(or
other supervisors) that he was stressed out. TR 202, 219.
he
However, Complainant conceded that at the March 15th meeting
and Mr. Hosmer discussed the stress of the dual-unit outage,
and
that he stated to Mr. Hosmer that life has stress. TR 87,
223.
Mr. Pagnozzi testified that it was common for Complainant to
talk
about stress. TR 585. The goals document prepared by Mr.
Bible
approximately one month before Complainant's April 30th
review
urged Complainant to attend a stress management course. RX
16 at
p. 2. Similarly, Complainant's letter of August 11, 1991, to
the
DOL referred to his "stress and tension." RX 30 at p. 2.
Mr.
Bible, Mr. Pagnozzi, Mr. Hosmer and Mr. Barrow all testified
that
Complainant discussed his stress and his personal problems
with
them. TR 510-511, 585, 677, 973-974.

Mr. Pagnozzi testified that the April 30th review of Complainant was his true opinion of Complainant's performance and no one influenced him in his rating of Complainant. TR 569, 901. Pagnozzi also testified that Complainant told him that he felt the review was something Mr. Pagnozzi had been forced to do. TR 569; RX 18 at p. 5. Pagnozzi testified that that was not true. In addition, he further testified that Complainant complained to him about his prior reviews on several occasions. According to Pagnozzi, he responded to Complainant on those occasions that he could not do anything about those reviews because they involved the period of time before Complainant came to work for him that they were "out of my hands." TR 569-570.

Senior Management Involvement

Every morning at approximately 7:40 a.m. Mr. Goldberg met with his key subordinates and had a conference call with other high-level employees working at the Company's nuclear plants. TR 720. After those telephone calls, policy issues were typically discussed. At one such meeting in early July, 1991, Mr. Goldberg stated that he was surprised by a newspaper article dealing with a certain employee (not Complainant). Goldberg stated that he did not know a lot about the situation. TR 720. Mr. Goldberg was not aware of the matter until it had reached a point that the employee was about to be terminated. Mr. Goldberg asked whether there were other employees with performance problems who might have to be terminated if their performance did not improve. Each person in the room addressed the question, and when Mr. Goldberg turned to Hosmer, he stated that he had an employee on accelerated reviews. TR 723. Mr. Goldberg asked to be briefed about the situation. TR 720-24, 835, 851-52.

Mr. Hosmer met with Mr. Goldberg and reviewed Complainant's history with the Company and discussed his performance

evaluations. TR 723, 937. Hosmer told Goldberg that
Complainant
was an engineer who was attending night school. TR. 837.
Hosmer stated that Complainant had made threats in the past
about
going to the media and the NRC. TR 723. Hosmer advised Mr.

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Goldberg that Complainant's performance had been declining
for
the past few years, but that the EAP had been suggested to
Complainant and that Mr. Barrow was counseling him. TR 723,
798-
799. Mr. Hosmer told Mr. Goldberg that he had met with
Complainant, and Complainant had stated he had high blood
pressure. TR 837. Goldberg asked Hosmer whether Complainant
was
fit for duty. TR 723, 798-799, 838. Hosmer responded that
he
did not know. Goldberg ended the meeting, stating that Mr.
Hosmer needed to think about that. TR 723-724.

Hosmer testified that he had not considered whether
Complainant was fit for duty until Goldberg asked the
question.
TR 793, 799. When Mr. Goldberg raised the fitness-for-duty
issue, he had no personal knowledge of Complainant. He did
not
know that Complainant had filed a concern with NSS or had any
nuclear safety concerns. TR 841-842, 853.

At that July meeting with his key subordinates, Mr.
Goldberg's question dealt with employees having performance
problems. He testified that his intent was to make sure that
the
Company made every effort to counsel such employees on a path
to
improved performance so that termination would not be
necessary.
TR 851-852.

After his meeting with Goldberg, Hosmer read the NRC's
fitness-for-duty regulations at 10 C.F.R. Part 26. TR 724;
RX

42. Mr. Hosmer refreshed his recollection that the
regulations
address factors such as stress, fatigue, and illness which
can
affect an employee's fitness for duty. TR 724-725; RX 42.

In
addition, Hosmer telephoned Mr. West and told him that
Complainant had reported that he was under stress, and also
described his performance problems. TR 725, 736-737, 876.

Mr.
Hosmer then asked West whether those facts formed the basis
for

Mr. challenging an individual's fitness for duty. TR 725, 876.
West replied that under the fitness-for-duty rules, a
determination had to be made. TR 725, 876. West further
stated that neither he nor Hosmer were qualified to make that
determination and that a professional evaluation would be
necessary. TR 876, 880.

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The NRC requires licensees, including FPL, to address
factors which could affect an employee's fitness for duty
such as mental stress, fatigue, and illness. TR 303, 738, 873; RX 35
at p. 44 (line 4), RX 42. It is the objective of the NRC's
fitness-for-duty regulations that nuclear plant personnel "are not
mentally or physically impaired from any cause which in any
way would adversely affect their ability to safely and
competently perform their duties." RX 35 at p. 44. FPL has a duty to
act on fitness-for-duty concerns. TR 303, 839-840.

On July 12, 1991, Mr. Barrow wrote a letter to his
supervisor, Mr. Davis, to apprise Davis of his counseling
efforts with Complainant. TR 515-516; RX 62 at p. 5. It can be
inferred from the second page of Barrow's letter that he told Hosmer
on July 11, 1991 that Complainant had gone to NSS, and may go to
the EEOC and the NRC. RX 62 at p. 6. Barrow, however, testified
that he did not tell Mr. Hosmer that Complainant had gone to NSS
or had threatened to go the NRC. TR 497, 516. The reference to
the NRC in Mr. Barrow's letter was speculation on his part. TR
497. Mr. Barrow did tell Mr. Hosmer that he felt Complainant was
apt to go to the NRC if his conflict with supervision continued.
TR 498-499. Mr. Barrow suggested that Mr. Hosmer may want to
reassign Complainant to the St. Lucie engineering group under
a different supervisor (*i.e.*, Dave Wolf). TR 498, 515; RX 62
at pp. 4, 6.

that
NRC.
things
canned
NRC.
past
Pagnozzi
through
NRC.

Hosmer also testified that Mr. Barrow did not tell him
Complainant had been to NSS or had threatened to go to the
TR 739. However, Smith stated to Hosmer that every time
do not go Complainant's way, Complainant responds with a
set of threats regarding lawsuits, the newspaper, and the
TR 680. Similarly, Hosmer, in his July meeting with Mr.
Goldberg, stated that Complainant had made threats in the
about going to the newspaper and the NRC. TR 723. Mr.
also testified that on several occasions Complainant went
a canned litany about going to the media, to NSS, and to the
TR 628-629.

July.
TR 532. Upon receiving it, Davis did not tell anyone in

[PAGE 33]

threatening to
go to the NRC. TR 529. Davis noted Barrow's comment about
Complainant's equal employment opportunity concerns, and told
Hosmer that he would like to have those concerns
investigated.
such
Larry
531-
report
Bossinger

management that Complainant had gone to NSS or was
TR 532; RX 62 at p. 6. Hosmer stated that he would welcome
an investigation. TR 532. Accordingly, Mr. Davis asked
Bossinger, Labor Relations Administrator, to investigate
Complainant's charges of national origin discrimination. TR
532. Mr. Bossinger conducted an investigation, and sent a
to Mr. Davis on August 14, 1991. TR 532; RX 61. Mr.
concluded that there was no basis for a claim of
discrimination.
discrimination
with the EEOC. TR 210.

288-
289, 585. Red badge training consists of requalification
training which is required of individuals having unescorted
access into the radiation controlled area of a nuclear power

in plant. TR 289, 585. Hosmer had directed that all engineers
the PEG group be badged for unescorted access. TR 585-586.
class. Pagnozzi told Complainant to make arrangements to take the
TR 586. Complainant advised Pagnozzi of the dates he had
scheduled the class, and Pagnozzi approved his attendance.
TR 586.

at On July 22, 1991, a stress management course was held
the Company. TR 586; RX 53. Pagnozzi wanted Complainant to
attend the class because Complainant had told him that he was
stressed out. TR 586, 588. Pagnozzi wrote a memorandum to
Patrick Higgins, Manager of the PEG group, recommending that
Complainant be permitted to attend the class. TR 287; RX 53.
psychologist Complainant attended the course. TR 116, 588. A
discussed ways in which conflicts arise, and how best to cope
with them in a corporation. TR 117.

Pagnozzi Complainant testified that he had no idea why Mr.
Pagnozzi recommended him for the course--that he never told Mr.
Pagnozzi that he was stressed out. TR 287-288. Complainant, however,

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was conceded that not everyone who wanted to attend the course
time allowed to go. TR 288. Pagnozzi testified that he took the
the to send a memorandum to Higgins, recommending Complainant for
course, because he felt that of all his employees Complainant
would benefit the most from the course. TR 588. Pagnozzi
wrote the following in his memorandum of July 7th to Higgins:

This course should help Richard in his dealings
with issues and people problems and hopefully
reduce some of his stress related concerns.9

RX 53.

345, Prior to his first quarterly review, Complainant asked
Pagnozzi what rating he would receive on the review. TR 344-
591-592. Pagnozzi told Complainant it was not appropriate to
discuss the rating prior to the review session, but that the
review session would be held on Tuesday, July 30th with Mr.
Hosmer. TR 592, 626. Complainant stated that Hosmer's
attendance was contrary to the agreement he had with Mr.
Barrow.

have TR 592. Complainant told Mr. Pagnozzi that he would have to
his lawyer present if Hosmer attended the review session. TR
118, 345, 592, 626.

an Pagnozzi told Complainant that he did not need to have
attorney present, but that Mr. Hosmer, as the director of the
department, had the right to attend a review session. TR
593.
Complainant insisted that he was going to bring his attorney
to
the session. TR 592-593. Accordingly, Pagnozzi told
Complainant
that if he intended to bring a lawyer to the review session,
he
should put it in writing so that he could advise Hosmer. TR
292,
593, 626.

Mr. On or about Friday, July 26, 1991, Complainant handed
Pagnozzi a memorandum stating that he "must" have his
attorney
present at the review session because Mr. Hosmer would be
there.
TR 593, 626; RX 20. At that time, Mr. Hosmer was in a
meeting,
but was interrupted with a message that Pagnozzi needed to
speak

the 9/ In Complainant's memorandum of July 26th, he also stated
that under the agreement between Mr. Barrow and Mr. Hosmer,
reviews would be "low-stress events." TR 294; RX 20 (line
7).
Complainant testified that his choice of the phrase "low-
stress
events" did not mean that the reviews caused him stress. TR
294.
Pagnozzi testified, however, that Complainant wanted the
reviews
changed to quarterly because monthly reviews were too
stressful
for him. TR 571. Moreover, after Complainant's review
session
with Mr. Smith concerning the revised annual review signed by
both Mr. Wade and Mr. Bible, Complainant went home sick. TR
996.
to him at once. TR 730. Pagnozzi spoke to Hosmer by
telephone
and reported that Complainant had demanded that his lawyer be
permitted to attend the review session, and that if he did
not
get permission to bring his attorney by 4:30 p.m. that day he
would go to the Miami Herald. TR 730-731, 816-817. Pagnozzi

without told Hosmer that Complainant would not attend the session
went his attorney. TR 816-817. Hosmer stopped his meeting and
Davis to see Mr. Davis and asked him what to do. TR 525, 731.
his stated that it was not appropriate for an employee to bring
should attorney to a review session, but Hosmer felt that they
525, let Complainant's attorney attend the review session. TR
731.

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Hosmer Because Davis and Hosmer had different opinions on the
house issue, Davis suggested Hosmer talk to Goldberg. TR. 731
TR did so and Goldberg said to consult with the Company's in-
decision attorney, Mr. Steve Carr, and abide by whatever he suggested.
observe 525, 731, 843. Davis and Hosmer met with Carr, and a
had was made to allow Complainant's attorney to attend and
session only; Carr would also attend. TR 294, 593-594, 733, 862. FPL
never allowed an attorney to attend a performance review
in the past. TR 734.

he Mr. Hosmer took the opportunity to ask Pagnozzi if he
talking thought Complainant was fit for duty. Pagnozzi replied that
about being under stress. TR 594.10

301, Mr. Hosmer called Complainant and told him that his
attorney could attend, but only to observe the session. TR
326, 731, 734; RX 39.

out Hosmer testified that he made the decision to question
to Complainant's fitness for duty when Mr. Pagnozzi called him
was of the meeting and informed him that Complainant had demanded
bring his attorney to the evaluation session, saying that he

[PAGE 36]

not coming unless his lawyer was allowed to attend. TR 734-735, 788, 791, 816-817; RX 22. Since his meeting with Mr. Goldberg a couple of weeks earlier, Hosmer testified that he had been thinking about the fitness-for-duty issue, but the Complainant's demand to bring his attorney to the review session was the trigger mechanism because Mr. Hosmer saw a change in behavior which he believed made Complainant unpredictable. TR 735, 795.

10/ In his Complaint to the DOL dated August 11, 1991, Complainant mentioned his "stress and tension." TR 320; RX 30 at p. 2.

According to Hosmer, Complainant's demand was upsetting because had and other supervisors had been working with Complainant to improve his performance and had even changed the frequency of the reviews at his request. TR 816. Hosmer interpreted Complainant's unpredictable behavior to mean that it was not certain if Complainant would report to work in the event of an accident, would do a calculation assigned to him, or keep an appointment. TR 817. Hosmer believed that this presented a very high risk situation in the nuclear power industry. TR 735.

In addition, Complainant had told Mr. Hosmer that he had been ill, was stressed out, and was not feeling well. TR 736, 791-792. Complainant had discussed his personal stress with Mr. Hosmer, talking about studying for his graduate degree, his in-laws moving to Florida, and his having to drive to the Turkey Point Plant. TR 791-792. Moreover, Hosmer knew that Complainant's performance had deteriorated. TR 736, 792. Accordingly, Hosmer decided to question his fitness for duty. TR 791-792.

Hosmer contacted Mr. West; he told him that he was going to question Complainant's fitness for duty, and asked him to arrange an appointment for Complainant to see a clinical psychologist,

staff
power
business.
Dr. Dennis Johnson, Ph.D. TR 683, 876. Dr. Johnson and his
work with approximately 20 utilities which operate nuclear
plants. TR 686. FPL constitutes less than 10% of his
TR 685. Dr. Johnson has evaluated other FPL employees in

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TR
688-
connection with post-employment fitness-for-duty questions.
693. West is the primary FPL contact with Dr. Johnson. TR
689, 875. Mr. West spoke to Dr. Johnson and set up an
appointment for Complainant. TR 877.

concerning
that
clear
argument
The
to
the
In mid-July, 1991, Hosmer had contacted Pagnozzi
Complainant's performance. TR 589, 726. Pagnozzi reported
Complainant would probably be rated 90% on his upcoming
evaluation. TR 589, 726. Hosmer asked Pagnozzi to write
goals for Complainant's improvement so there would be no
about what was expected of him. TR 589, 727-729, 790-791.
initial document written by Mr. Pagnozzi was not acceptable
Mr. Hosmer. Thereafter, Mr. Pagnozzi rewrote goals for
improvement, and the document was presented to Complainant at
review session. TR 727-729; RX 21 at p. 5.

21 at
review,
analysis,
2-3.
had
planning
Mr. Pagnozzi also prepared a performance appraisal on
Complainant dated July 30, 1991. TR 589; RX 21. He gave
Complainant an overall rating of 90%. TR 300, 345, 595; RX
p.4. With respect to the individual categories on the
Mr. Pagnozzi rated Complainant 100% in technical/job
knowledge and also in initiative. TR 595-596; RX 21 at p. 2.
Complainant received 90% ratings in judgment/problem
organization and planning, and dependability. RX 21 at pp.
Complainant had previously received below average ratings in
judgment/problem analysis on his 1980, 1981, 1989, and 1991
reviews. RX 1 at pp. 2, 6, 34; RX 15 at p. 2. Complainant
also received below average ratings in organization and
on his 1980, 1988, and 1989 reviews, and in the dependability
category on his 1988 review. RX 1 at pp. 2, 30-34.

30th In the organization and planning category on the July
average review, Mr. Pagnozzi commented that Complainant's below
rating was demonstrated

by his approach to the EDSSi [sic] document
review. He was counseled several times
regarding the expected format and resisted
change. . . .

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RX 21 at p. 2

Mr. Pagnozzi included the following comment in the
dependability category:

The most critical of his assignments (VCT level
setpoint calc) during this period was not
completed. This was identified as critical
in his 4/30/91 appraisal. . . .

In the cooperation category, Mr. Pagnozzi gave
Complainant an 80% rating and commented that Complainant was unwilling to
work with other people to constructively solve problems. TR
596;
average RX 21 at p. 3. Complainant had previously received below
reviews. ratings in cooperation in his 1981, 1987, 1988, and 1991
RX 1 at pp. 6, 27, 31, and RX 15 at p. 3.

In the review, Mr. Pagnozzi noted that Complainant's
strongest qualification was his technical capabilities in the
I&C area. TR 596-597; RX 21 at p. 4. In the area of the
appraisal form dealing with principal areas for improvement, Mr.
Pagnozzi referred to the document he prepared at Mr. Hosmer's
direction. TR 597; RX 21 at p. 4. The document gave Complainant
recommendations for improvement in four categories:
Judgment/problem analysis; organization and planning;
dependability; and cooperation. RX 21 at p. 5. In the goals
section of the appraisal form, Mr. Pagnozzi told Complainant
that he needed to improve his performance to at least a 100%
overall rating within the next three months. TR 597; RX 21 at p. 4.
Mr. Pagnozzi himself prepared the appraisal. TR 596. No one
told

Hosmer Mr. Pagnozzi what to write on the review. TR 596. Mr.
did not tell Mr. Pagnozzi how to rate Complainant. TR 728.

Mr. Pagnozzi presented the appraisal to Complainant at
the review session on July 30, 1991, which was also attended by
Attorney Oliver Harris, Complainant's attorney, Mr. Hosmer and
Carr. TR 122, 295, 298, 595, 598, 740.

After Mr. Pagnozzi reviewed the appraisal with
Complainant,

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Mr. Hosmer handed Complainant a written memorandum, stating
that he was questioning Complainant's fitness for duty and
directing him to be evaluated by Dr. Johnson. TR 123, 300-301, 598,
863-864; RX 22. Mr. Hosmer's memorandum was dated July 26, 1991.
RX 22. The memorandum stated, in part:

I question your fitness-for-duty for unescorted
access. For that reason, I direct you to consult
with Dr. Johnson, a psychologist. An appointment
has been set up for 11:00 a.m. on July 31, 1991,
in Stuart, Florida. The purpose of this visit is
to determine your fitness for unescorted access.
Failure to consult with Dr. Johnson will result in
disciplinary action, including removal of your
unescorted access privilege. RX 22.

Under FPL's fitness-for-duty policy, psychological
testing may be used to ensure fitness for duty when an employee
demonstrates a lack of reliability, stability or
trustworthiness.
EX 41 at p. 4. The NRC's fitness-for-duty regulations
require licensees to assure that power plant personnel perform their
tasks in a reliable and trustworthy manner. TR 738; RX 42.
To Mr. Hosmer that meant that employees must act in a
predictable manner. TR 738.

The memorandum which Mr. Hosmer handed Complainant at
the July 30th review session also discussed Complainant's
performance. TR 300, 745; RX 22. The memorandum stated the
following:

This is the second 90[%] performance evaluation

in your PEG assignment. No substantial performance improvement has been noted. Significant improvement is needed in judgment/problem analysis, organization and planning, dependability and cooperation. If significant improvement is not achieved within 90 days, you will face termination. RX 22.

Mr. Hosmer included that warning because he wanted Complainant to know that his below average performance was a major concern. That was the same message Mr. Hosmer delivered to Complainant when he stopped the April 30th review session, and told Complainant that it was a serious matter that four different supervisors had evaluated him at 90%. TR 745.

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Complainant then read a statement about his nuclear safety concerns and said he was going to NSS as soon as the review session was over. TR 740-741. 864. Complainant signed Mr. Hosmer's memorandum, acknowledging that he received it on July 30th in the presence of his attorney. RX 22.

Mr. Harris then asked to go outside the meeting room to speak with Complainant. TR 599, 743, 865. Complainant had requested the break to talk to Attorney Harris about taking the psychological test the very next day. TR 126, 304.

After the break Harris came into the room without Complainant. TR 599, 743-744. An off-the-record discussion ensued. TR 599-600, 865-866. Thereafter, Harris requested that the appointment with Dr. Johnson be postponed. TR 124, 304, 600, 744. Mr. Hosmer agreed to a postponement, and directed Mr. Pagnozzi to have the appointment rescheduled for August 2, 1991. TR 304-305, 600, 744.

Later, Pagnozzi called Complainant at home and told him that he did not have to see Dr. Johnson the following morning because the appointment had been changed to Friday, August 2nd. TR 305, 600-601. Pagnozzi suggested that Complainant take Wednesday and Thursday as vacation days so that he could rest and be prepared for the appointment on Friday. Complainant agreed to take the two days off. TR 305-306, 601.

On Friday, August 2nd, Complainant reported to work as

usual instead of keeping his appointment with Dr. Johnson.

TR 306, 601. Pagnozzi asked Complainant if he was going to keep
the appointment with Dr. Johnson, and he replied that he was not.
Pagnozzi telephoned Hosmer to report that Complainant was not
going to keep the appointment. TR 601.

Mr. Hosmer called Complainant and asked him whether he
was going to keep the appointment with Dr. Johnson, and he again
replied that he was not. Hosmer told Complainant that he was
disappointed and asked him to reconsider. TR 306, 746-747;

RX 43 at pp. 1, 4. Complainant stated that he did not attend the
appointment on advice of his attorney. TR 307, 747. Hosmer
told Complainant that he would have to pull his unescorted access
badge. Hosmer called Mr. West and had Complainant's red
badge

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pulled. TR 746; RX 43 at pp. 1, 4.

During the off-the-record conversation at the July 30th
review session, Harris implied that Complainant had other
safety related concerns which he was not disclosing at that time.

TR 747-748, 845. In addition, there was a subsequent telephone
conversation between Mr. Carr and Mr. Harris in which Mr.
Harris made a similar statement. TR 748, 867. Accordingly,
Hosmer and Carr met with Goldberg to advise him of what had
happened. TR 748, 867. Thereafter, Goldberg wrote a letter
to the NRC dated August 2, 1991, reporting that Complainant may
have potential safety concerns. TR 747, 844; RX 44. Carr also
sent a letter to Harris, encouraging Complainant to promptly report
all of his safety concerns to either FPL or the NRC. TR 748; RX
24. Hosmer sent a similar letter directly to Complainant. TR
749; RX 25.

On August 2nd, Harris sent a letter to Carr stating
that Complainant would meet with Dr. Johnson if Attorney Harris
was present and a tape recording was made of the interview. TR
131, 748-751, 866; RX 23. Hosmer contacted West and asked him to
see

asked if the conditions would be accepted by Dr. Johnson. West
Dr. Johnson, who advised that that was not how interviews and
evaluations are done. TR 609, 690, 877, 878. Dr. Johnson,
however, told West that he would consult with his attorney,
who was also a licensed psychologist, and report back to Mr.
West. Dr. Johnson told Mr. West that his company had conducted over
15,000 interviews nationally, and no such request had ever
been made. Later, Dr. Johnson advised West that the conditions
were not acceptable because they would invalidate the results of
the testing. TR 691, 878.

Hosmer met with Complainant on Monday, August 5th, and
advised him that the Company was considering the two
conditions that Attorney Harris included in his letter. TR 751; RX 45.
Hosmer discussed Complainant's obligation to disclose all of
his safety concerns to FPL, the NRC or NSS. RX 43 at pp. 1, 5;
RX 45. Complainant testified that he told Mr. Hosmer that part
of the second condition was that he would not answer any
questions

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which he felt violated his sense of dignity. TR 310.
Complainant also stated that he was not aware of any employee
who was permitted to bring an attorney to or tape record a
session with Dr. Johnson. TR 311.

On August 8, 1991, Carr sent Harris a letter advising
that Dr. Johnson had rejected the two conditions suggested in his
letter. Carr stated that "Dr. Johnson advised that
conducting an interview on these terms would be inappropriate and could
compromise the validity of the evaluation process." RX 28 at
p.

1. Carr also advised Harris that if Dr. Johnson opined that
Complainant was unfit for duty, that determination could be
appealed. TR 313-314, 752-753, 875. Carr went on to state:

FPL will provide you and [Complainant] with a
copy of any written report Dr. Johnson prepares
for FPL after the evaluation. If Dr. Johnson
finds that [Complainant] is fit for duty, the
matter will be concluded. If Dr. Johnson finds
otherwise, FPL will make a fitness determination

and take appropriate action based on Dr. Johnson's evaluation. In such event, if [Complainant] is not satisfied or disagrees in any way with the report or with FPL's determination and follow-up action, he may appeal. If he appeals, he may submit a report from a psychologist of his own choosing for FPL's consideration and an impartial internal management review.

RX 28 at pp. 1, 2.

On August 8, 1991, Hosmer was advised that Dr. Johnson could not conduct the evaluation under the conditions requested by Attorney Harris. TR 749, 752. Hosmer went to Complainant's work area, advised him that the conditions were not acceptable to Dr. Johnson, informed him that the appointment with Dr. Johnson had been reset for August 19th at 9:00 a.m., and told him that he would face termination if he failed to keep the appointment. TR 749, 752; RX 46, 47. Hosmer again directed Complainant in

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writing to meet with Dr. Johnson. TR 312, 602; RX 47. Mr. Hosmer advised Complainant that there was a simple path to success: Improve his performance and see Dr. Johnson. TR 752.

On Friday, August 9, 1991, Complainant gave Mr. Pagnozzi a letter and, as an attachment, a copy of a letter from Complainant to the NRC, raising alleged safety concerns. TR 315-316, 602; RX 29. That was Pagnozzi's first knowledge that Complainant had gone to the NRC. TR 602. On or about August 9th, Pagnozzi in turn gave the letter to Hosmer. Prior to that time, Mr. Hosmer was not aware that Complainant had contacted the NRC. TR 753.

Upon receipt of the letter, Hosmer decided that he needed to investigate the issues which Complainant was raising with the NRC. Hosmer told Mr. Paduano to hire a consultant from Tenera, an independent consulting firm, to review the Setpoint Project. Hosmer believed that Mr. Geiger would also need to hire a consultant to investigate Complainant's allegations.

Accordingly, Hosmer talked to Geiger on or about August 9th about Complainant in order to be sure that if Mr. Geiger hired a consultant he did not hire the same person from Tenera. TR 436-437; 753-754.

Complainant did not keep his appointment with Dr. Johnson on August 19, 1991. TR 131-132, 322, 605, 756. Mr. Hosmer learned that Complainant was at work, and went to his work site to meet with him. TR 756. Mr. Hosmer took a security guard and a person from Human Resources with him. TR 132, 756. Mr. Hosmer asked Complainant if he was physically able to attend the appointment with Dr. Johnson. TR 132, 322, 756; RX 49. Complainant stated that he was but did not keep the appointment because his attorney advised him not to. TR 132, 322, 756; RX 49.

Mr. Hosmer brought Complainant away from his work area and met with him, Mr. Pagnozzi, and a representative from Human Resources in the private office and discharged Complainant for insubordination. TR 131-132, 605; RX 31, 49, 50.

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Complainant's three stated reasons for not keeping the appointment with Dr. Johnson were as follows: (1) he had allegedly observed a pattern of retaliation for advocating nuclear safety modifications and for going to NSS; (2) he would have been doing a disservice to his profession and the community by participating in something which was allegedly distorting the fitness-for-duty regulation; and (3) he feared damage to his reputation, career and life if Dr. Johnson found him to be unfit for duty. TR. 128-129. Complainant included the third reason for not seeing Dr. Johnson even though he testified that he knew he could appeal any adverse finding by Dr. Johnson and see a psychologist of his own choosing. TR 313-314; RX 28 at p. 2. Complainant also testified that he had no evidence that Dr. Johnson would render a biased report or had predetermined what his conclusion would be. TR 329.

At FPL, according to Mr. Goldberg, insubordination on a single occasion is a dischargeable offense. If Complainant had kept the appointment with Dr. Johnson, he would not have been discharged regardless of the results of the psychological evaluation. If Dr. Johnson had found Complainant to be fit for duty, that would have ended the matter. TR 845, 858-859; RX 28 at p. 1. If Dr. Johnson had found otherwise, he would have recommended a plan of treatment. TR 693-694, 858.

Hosmer and Davis testified that other employees in the Nuclear Engineering Department have had accelerated performance reviews and others have received 90% reviews. TR 526-531, 710. To Hosmer's knowledge, none of those employees had gone to NSS, the NRC, or raised any nuclear safety concerns. TR 710.

Mr. West testified that from 1986 through 1991, ten other employees had been directed to see Dr. Johnson for post-employment psychological, fitness-for-duty evaluations. Those employees were not summarily dismissed after being evaluated by Dr. Johnson, and five of the ten employees still work for FPL. After treatment programs, Dr. Johnson has reevaluated employees and found them to be fit for duty. TR 694, 874-875. No other employee ever refused to be evaluated by Dr. Johnson. RX 35 at p. 36.

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Investigation by the NRC

From October 28, 1991 until November 8, 1991, the NRC investigated allegations contained in Complainant's complaint to the NRC. TR 335-336, 468; RX 35 at p. 1. The NRC issued its inspection report with respect thereto in January of 1991. RX 35 at p. 1. Thirteen allegations were raised by Complainant. RX 35 at p. 7. One allegation involved ethnic discrimination against Cuban Americans. RX 35 at p. 41. That allegation was not investigated by the NRC because it was within the jurisdiction of

one the EEOC. RX 35 at p. 41. Of the remaining 12 allegations,
was partially substantiated. RX 35 at p. 8. That allegation
related to technical plant modifications such as the power
mismatch circuits. RX 35 at p. 8. With respect to those
modifications, the NRC concluded that "[e]ach modification
that was postponed during the dual-unit outage at [the Turkey
Point Nuclear Plant] was determined to have no impact on plant
safety."
RX 35 at p. 8.

candid The report stated that NRC inspectors had open and
discussions with over 60 engineers, 43 of whom were in non-
supervisory positions. RX 35 at p. 42. The NRC concluded
that NSS was not being used to discriminate against employees. TR
468-469; RX 35 at p. 46.11/

that The NRC also investigated Complainant's allegation
FPL was using psychological testing to discriminate against
employees who had taken safety concerns to NSS. RX 35 at p.
33.

According to its report, the NRC's investigation of that
allegation revealed that ten individuals (other than
Complainant)
had been directed by FPL management to be psychologically
evaluated since January of 1986. RX 35 at p. 36. The NRC's
report noted that Complainant "was the only individual who
refused a management directed psychological evaluation." RX
35
at p. 36. The NRC's report stated that the NRC inspector
"found
no inappropriate or discriminatory use of psychological
evaluation requirements." RX 35 at p. 36.

The NRC's report concluded by stating the following:

interviews Based on the results of the engineering staff
and the inspection of documented employee concerns,
this allegation was not substantiated. The inspection did

11/ In June of 1990, the NRC conducted an inspection of FPL's
NSS Program. TR 466, 830. The inspection was conducted to
evaluate the effectiveness of the NSS Program. RX 57 at p.

4.
The NRC's report concluded that NSS was an effective program
for identifying and resolving employee concerns, that the
identity of concerned individuals was appropriately protected, and that

TR

coordination with the NRC Residents' Office was excellent.
466, RX 57 at p. 4 and 5.

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not substantiate that the Speakout program is being used to discriminate against employees who raised safety concerns ... [N]o correlation could be found between the ... psychological evaluation, and the identification of employee concerns to FPL management, Speakout, or the NRC.... The inspection indicated no correlation between disciplinary action and going to Speakout or being psychologically tested ...

RX 35 at p. 36.

inspection
report: The NRC also made the following findings in its

There was no evidence found to substantiate the allegations of an overall atmosphere of intimidation, threats, coercion, harassment, or *negative evaluations* to limit the pursuit of safety issues. RX 35 at 8 (emphasis added).

there
receiving
covered
to
In 1991, FPL also conducted a study to determine if
was any pattern of employees of the Nuclear Engineering Department bringing a concern to NSS and, thereafter,
an adverse personnel action. TR 467; CX 41. The study
the period of time from approximately May, 1990 through May, 1991, and included Complainant. TR 477, 480-481. The study concluded that no adverse personnel actions had been taken against anyone as a result of a concern having been brought
NSS. TR 468.

him
documents. Complainant also stated that FPL had retaliated against
for going to NSS, and that FPL asked him to falsify

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the
the
TR 333-334. Complainant's statement about the alleged falsification of documents referred to Complainant's work on
VCT calculation. RX 29 at p. 9 (line 4). As noted above,
NRC investigated that allegation. RX 35 at pp. 18-21.

35 at

Complainant's allegation was not substantiated. TR 358; RX
p. 21. The NRC stated that following:

The issued calculation was correct and the assumptions were accurate. Evidence was not found to substantiate that any portion of the final calculation had been falsified. Therefore, it could not be substantiated that the supervisor was attempting to intimidate [Complainant] to change or falsify the VCT setpoint calculation. RX 35 at p. 20.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

the

FPL is an employer within the meaning of Section 210 of
ERA.

Section

Complainant is an employee within the meaning of
210 of the ERA.

In this case, Complainant initially has the burden of proving a *prima facie* case by a preponderance of the evidence.

To prove a *prima facie* case, an employee must establish each of the following elements:

- (a) That the employee engaged in protected activity;
- (b) That the employer knew that the employee engaged in protected activity;
- (c) That the employer took some adverse action against the employee; and
- (d) The employee must present evidence sufficient to at least raise an inference that the protected activity was the likely reason for the adverse action.

[PAGE 48]

of

of

at

ERA-2,

1983)

Sellers v. Tennessee Valley Authority, 90-ERA-14 (Secretary of Labor's Final Decision and Order, April 18, 1991), Decisions of the OALJ and OAA, Vol. 5, No. 2, March-April, 1991, p. 165, 166, citing *Dartey v. Zack Company of Chicago*, Case No. 82- (Secretary of Labor's Decision and Final Order, April 25, 1983) slip opinion at pp. 5-9.

If the employee establishes a *prima facie* case, the

alleged employer has the burden of presenting evidence that the
adverse action was motivated by legitimate, nondiscriminatory
reasons. *Id.* The employer's burden is one of production and
not persuasion.

If the employer articulates a legitimate,
nondiscriminatory reason for its action, the employee, to prevail, must
establish that the employer's proffered reason was not its true reason,
but, instead, a pretext to mask illegal discrimination. *Id.*

If the employee proves that the adverse action was
motivated, in part, by prohibited reasons (*i.e.*, that the
employer had "dual motives" for its action) then the employer
must show that it would have taken the same action even if
the protected activity had not occurred. *Dartey, supra*, at pp.
8-9;
Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159,
1163-1164 (9th Cir. 1984).

Where an employer has a legitimate reason for
disciplining an employee, it need not forego such action simply because
the employee engaged in protected activity. *Dunham v. Brock*, 794
F.2d 1037, 1041 (5th Cir. 1986); *Dartey, supra*, at p. 12.

In this regard, the NRC's regulations under Section 210
of the ERA provide, in pertinent part, as follows:

An employee's engagement in protected activities
does not automatically render him or her immune
from discharge or discipline for legitimate reasons
or from adverse action dictated by nonprohibited
considerations.

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10 C.F.R. §50.7(d).

Insubordination is a valid reason for discipline.
Dunham, supra, 794 F.2d at 1041.

Section 210 of the ERA contains a thirty-day statute of
limitations. An employee who believes that his employer took
adverse action against him because he engaged in protected
activity must file a complaint with the DOL within thirty
days
after the alleged adverse action occurred. 42 U.S.C.
§5851(b)(1). See also 29 C.F.R. §24.3(b); and 10 C.F.R.

§50.7(b) .

I find that Complainant's first Complaint to the DOL was dated August 11, 1991. RX 30. Accordingly, any adverse action allegedly taken against Complainant before July 12, 1991 is time barred. Therefore, I find that only the following alleged, adverse actions occurred within the actionable period: (1) Complainant's July 30th performance appraisal, (2) Mr. Hosmer's directive that Complainant submit to a fitness-for-duty psychological evaluation, and (3) Complainant's discharge for refusing to see the psychologist.

There is a split of authority as to whether a safety complaint filed with an internal, company-sponsored program such as NSS constitutes protected activity within the meaning of Section 210 of the ERA. In *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984), the Fifth Circuit held that internal safety complaints are not covered by Section 210. The Ninth and Tenth Circuits have reached the opposite conclusion. See *Mackowiak, supra*; *Kansas Gas and Electric Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985). The Secretary of Labor has held that reporting alleged safety problems internally to one's employer is protected activity within the meaning of the ERA. *Bivens v. Louisiana Power & Light*, 89-ERA-30 (Secretary of Labor's Decision and Order of Remand, June 4, 1991), *Decisions of OALJ and OAA*, Vol. 5, No. 3, May-June, 1991, p. 152, at 153.

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In the instant case, I find that Mr. Hosmer did not learn that Complainant had contacted the NRC until August 9, 1991. TR 753. I further find that Mr. Hosmer did not know that Complainant had gone to NSS until Complainant announced it at the July 30th review session. TR 740. While the Secretary has determined that internal complaints are protected activity, I find that Mr. Hosmer's decision to send Complainant to Dr. Johnson for a psychological, fitness-for-duty evaluation could not have been motivated by any protected activity because Hosmer

find made that decision on July 26th. TR 734-735. Similarly, I
for that when Goldberg raised the issue of Complainant's fitness
further duty to Hosmer in early July, Goldberg did not know that
Complainant's Complainant had raised any safety concerns. TR 842. I
in find, therefore, that Goldberg's suggestion that
retaliation for any protected activity.

had Assuming, *arguendo*, that Hosmer knew that Complainant
fitness engaged in protected activity prior to questioning his
for duty, I find that Complainant also failed to establish a
prima facie case with respect to the directive to see Dr.
Johnson, because I further find that the directive was not an
adverse action, as it was non-punitive.

that In this regard, I find that if Dr. Johnson concluded
matter. Complainant was fit for duty, that would have ended the
would If Dr. Johnson concluded otherwise, a course of treatment
the have been prescribed to return Complainant to a fit-for-duty
status. In this context, I find that Complainant was free to
appeal any determination made by Dr. Johnson and submit to
Company an evaluation by a psychologist of his own choosing.

employee's I find that FPL had a reasonable suspicion that
Complainant's fitness for duty may be questionable because
important aspects of his performance were repeatedly below
average and he had discussed his stress, fatigue and medical
problems with numerous people. Under these circumstances and
because of NRC regulations require an inquiry into an
fitness for duty, I find that FPL acted reasonably and within
their regulatory mandate in requesting a fitness-for-duty
evaluation of Complainant.

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fitness- In the context by which the directive to take the
direct for-duty evaluation was issued, I find that Hosmer did not
Complainant Complainant to take the test because of his alleged protected
activity. I find that when Hosmer decided to have
had evaluated by Dr. Johnson, he did not know that Complainant

the
fitness
gone to NSS. I further find that Complainant did not contact
NRC until after Hosmer made the decision to question his
for duty. Accordingly, I conclude that Complainant failed to
establish a *prima facie* case with respect to the directive
to see Dr. Johnson.

him
statute
Complainant's
Complainant
was
being
review
Hosmer's
to
not
conclude
Complainant also alleged that FPL discriminated against
by giving him poor performance evaluations and more frequent
performance evaluations. Because of the ERA's thirty-day
of limitations applicable to this proceeding, I find that the
only evaluation within the actionable period was
July 30th review prepared by Mr. Pagnozzi, wherein
received an overall rating of 90%. I find that this review
not Complainant's annual review, but was an interim review
used as a tool to help Complainant improve his performance by
giving him periodic feedback on his work. I find that the
included a detailed statement prepared by Pagnozzi at
direction, explaining how Complainant could improve his
performance. RX 21 at p. 5. Because the review was written
help Complainant improve his performance, I find that it did
constitute adverse action under the ERA. Therefore, I
that Complainant failed to establish a *prima facie* case
with respect to that allegation.

form
Wade in
placed
after
only
was
his
Complainant
Complainant's testimony on direct examination indicates
that he believed that the accelerated review process was a
of retaliation in that he was not placed on accelerated
performance reviews after receiving a 90% rating from Mr.
1991, but only after he advocated certain projects allegedly
having safety implications. TR 48-50. I find, however, that
upon receiving the 90% rating in 1991, Complainant was not
on accelerated reviews. I further find that it was only
Complainant initiated an appeal of his rating to Hosmer, and
after Hosmer decided to increase his rating that Complainant
placed on accelerated reviews. Complainant did not appeal
1989 rating to Mr. Hosmer. I find that Hosmer placed

on accelerated reviews to help him improve his performance through feedback from supervision. Accordingly, I conclude that Complainant receiving accelerated reviews in 1991 does not constitute illegal discrimination or retaliation.

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I find that the only adverse action taken by FPL was that it discharged Complainant. I find that the adverse action was taken because he twice refused Hosmer's lawful order to see Dr. Johnson. This order warned Complainant that his "failure to attend this appointment will result in disciplinary action, up to and including discharge." RX 47. I find that the failure of Complainant to comply with was clearly insubordinate. I find that adverse action about which Complainant now complains would not have happened if he had kept the appointment with Dr. Johnson.

I find that the proper course of action was for Complainant to comply with Hosmer's directive for a psychological evaluation. Hosmer was acting within the scope of his authority and his directive was reasonable in light of the mission of the Employer and the NRC regulations governing such matters as having senior engineers fit for duty. See 10 CFR §26.20(a).12 Additionally, I find that Complainant could have appealed any adverse finding made by Dr. Johnson.

I find that requiring a psychological evaluation is a legitimate management decision. I note that the NRC's regulations require that new employees of a licensee undergo psychological assessments prior to being granted unescorted access to the radiation controlled areas of a nuclear power plant. 10 C.F.R. §73.56(b) (2) (ii).

12/ Section 26.10(a) of the regulation sets forth, in part, the purpose behind the requirement that licensees establish fitness-for-duty programs. That section provides that the objective of a fitness-for-duty program is to [p]rovide reasonable assurance that nuclear power plant personnel will perform their tasks in a reliable and trustworthy manner and are not under the influence of any substance, legal or illegal, or

way
perform
mentally or physically impaired from any cause, which in any
adversely affects their ability to safely and competently
their duties. . . . 10 C.F.R. §26.10(a) (emphasis added).

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regulation,
FPL's
nuclear
In accordance with the NRC's fitness-for-duty
FPL has established a fitness-for-duty program. RX 41.
program addresses not only drugs and alcohol, but also other
factors to ensure that personnel are fit for duty in a
plant. TR 838-839. The Company's fitness-for-duty policy
provides, in part, as follows:

Psychological testing, observation of per-
formance, drug/alcohol abuse testing and
background checks may be used to ensure
the fitness for duty of employees.

Company's
potentially
Company
the
its
736,
I find that under the NRC's regulations and the
fitness-for-duty policy, Hosmer had the responsibility to see
that the people working for him were fit for duty. I further
find that if company supervision fails to recognize a
unfit employee and a safety-related incident occurs, the
is held responsible by the NRC. In such a case, aside from
potential safety risk, the Company can be fined or even lose
license to operate its nuclear power plants. TR 725, 735-
841.

and,
can
that
I find that Complainant worked as a Senior Engineer,
in the interest of nuclear safety, it is necessary that such
persons be able to make sound judgments in order that they
perform their tasks in a competent manner. I further find
Hosmer ordered the psychological evaluation to have an expert
determine whether Complainant was fit for duty.

dismissal,
to
30th
In tracing the events that led to Complainant's
I find that Complainant did not present evidence sufficient
raise an inference that he received a 90% rating on his July
review because of any alleged protected activity. On the

ratings contrary, I find that the evidence established that the
in the individual categories were similar to previous reviews
received by Complainant, some of which occurred before any
alleged protected activity. Moreover, the 90% overall rating
was not unique to that review. RX 1(I). I further find that
Complainant conceded that he received that rating before he

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raised any nuclear safety concerns. TR 155-156.

I find that on the July 30th review, Complainant
received below average ratings in the following four individual
categories: judgment/problem analysis; organization and
planning; dependability; and cooperation. RX 21 at pp. 2-3.
I further find that Complainant had previously received below
average ratings in those categories on other reviews. He
received a below average rating in judgment/problem analysis
in, *inter alia*, 1989. RX 1 at p. 34. Similarly, Complainant
received a below average ratings in organization and planning
in, *inter alia*, 1988 and 1989. RX 1 at pp. 30, 34. Complainant
also received a below average rating in the dependability category
on his 1988 review. RX 1 at p. 31. Finally, Complainant
received below average rating in cooperation in, *inter alia*, 1987 and
1988. RX 1 at pp. 27, 31. As with previous reviews,
Complainant received a good rating in technical/job knowledge. RX 21 at
p. 2. Thus, I find that the ratings Complainant received on his
July 30th review do not create an inference of prohibited
discrimination or retaliation. They are consistent with
similar below average ratings he received prior to allegedly raising
any nuclear safety concerns.

I find that Complainant also failed to present evidence
creating an inference of discrimination with respect to the
requirement that he see Dr. Johnson. FPL, as a licensee of
the NRC, is required to take steps to assure that its employees
are fit for duty. The Company's policy must address factors in
addition to drugs or alcohol which could affect an employee's
fitness for duty such as mental stress, fatigue and illness.
I find that Complainant did make statements to supervisors that
he

had health problems, was taking medications, was under stress both on and off the job, and was fatigued. I credit uncontroverted testimony of Dr. Johnson, the only expert witness at the hearing, and find that it was reasonable to refer Complainant for a psychological evaluation under those circumstances. TR 696-697. I further find that the requirement that Complainant be psychologically evaluated did not create an inference of illegal discrimination or retaliation.

[PAGE 55]

I find that the evidence did not create an inference that Complainant was singled out for the evaluation because of any protected activity. I further find that the evidence established that FPL has sent other employees to Dr. Johnson for post-employment, fitness-for-duty, psychological evaluations. TR 874. There was no evidence that any of those persons had engaged in any "whistleblowing" activities. The evidence is to the contrary. During an extensive inspection, the NRC investigated that issue and found that there was no correlation between psychological evaluations and bringing concerns to FPL management, NSS, or the NRC. RX 35 at p. 46. The Company's own study reached the same conclusion. TR 468; CX 41. I find that Complainant failed to establish even a *prima facie* case with respect to his allegation that he was wrongfully directed to see Dr. Johnson.

I find that the evidence presented by Complainant also failed to create an inference that he was discharged for engaging in any protected activity. I find that Complainant was discharged because he was insubordinate by not keeping the appointment with Dr. Johnson on August 2nd. I find it significant that FPL did not seize upon that insubordinate conduct and immediately discharge Complainant. Instead, Hosmer personally asked Complainant to reconsider his refusal to see Dr. Johnson.

In addition, FPL also did not summarily reject the conditions which Complainant thereafter requested in connection with the psychological evaluation. On the contrary, FPL

would consulted with Dr. Johnson to determine if the conditions
be acceptable to him. Only after Dr. Johnson rejected the
conditions did FPL tell Complainant that they were
unacceptable.

August I find that Complainant was again insubordinate on
19th when he refused, for the second time, to see Dr. Johnson
as directed by Mr. Hosmer. Complainant refused to keep the
appointment even though he knew that he could appeal any
adverse finding by Dr. Johnson. FPL Attorney Carr carefully
explained that in writing to Complainant's attorney. RX 28
Accordingly, I

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in find that Mr. Hosmer made an appropriate management decision
discharging Complainant. I further find that FPL acted
reasonably in obtaining Complainant's compliance with what it
reasonably saw as its obligation under the NRC's fitness-for-
duty regulations. Therefore, I find that Complainant failed to
establish a *prima facie* case with respect to his
termination.

Assuming, *arguendo*, that Complainant had established a
prima facie case with respect to any of the foregoing
allegations, FPL has articulated legitimate,
nondiscriminatory reasons for its actions. I find that FPL established valid
reasons for evaluating Complainant more frequently than once
a year. Complainant had complained to Mr. Hosmer about the
below average annual review he received in February of 1991 from
Mr. Wade. In connection with that complaint, Hosmer decided to
increase his rating to a 100% even though Mr. Smith had
reviewed the bases for the 90% review and assured Hosmer that it was
fair. I find it reasonable that, having changed the review, Hosmer
decided to give Complainant periodic feedback with clear
performance goals and expectations.

I note that it is not disputed that Complainant agreed
with the idea of receiving periodic feedback. TR 227. Moreover,
it is significant that when Complainant complained after his first
monthly review session, Mr. Hosmer agreed to make the reviews

quarterly with fewer people involved. Complainant was evaluated on July 30th because his performance had declined the previous appraisal year and Mr. Hosmer wanted to help Complainant improve his performance by giving him periodic feedback from supervision. Therefore, FPL has articulated a legitimate, nondiscriminatory reason for evaluating Complainant more frequently than annually.

I find that FPL has also articulated valid reasons for giving Complainant a 90% overall rating on his July 30th review. The review reflects that Complainant's performance was deficient in a number of areas. Therefore, below average ratings were warranted. For example, Mr. Pagnozzi rated Complainant below average in the judgment/problem analysis category. Mr. Pagnozzi commented on the review that the below average rating was demonstrated by, *inter alia*, Complainant's approach to the VCT calculation. The evidence clearly established that Complainant's calculation was incorrect. Complainant, however, refused to reconsider his calculation even though the error was explained to him on more than one occasion. Finally, Complainant had to be removed from the project.

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Basil Pagnozzi also rated Complainant below average in the category of organization and planning. In that category, Mr. Pagnozzi commented that Complainant's below average performance was demonstrated by his approach to the EDSFI document review project. I find that the evidence established that Complainant did not perform that project as he had been directed to do by Mr. Pagnozzi. Therefore, the 90% rating in that category was justified.

In the dependability category, Pagnozzi also gave Complainant a 90% rating. He noted that Complainant failed to complete his most critical job assignment (the VCT calculation) during the period of time covered by the July 30th review. I

VCT find that Complainant did not devote three days a week to the
calculation project as he had been directed to do.
Therefore, I
was further find that Mr. Pagnozzi's 90% rating in that category
justified.

other The testimony at the hearing also established that
have employees have received 90% overall performance reviews and
find been reviewed more frequently than annually. Therefore, I
legitimate, that FPL met its burden of production by articulating
30th nondiscriminatory reasons for evaluating Complainant on July
and giving him a 90% rating.

and I further find that FPL established a legitimate,
adversely nondiscriminatory reason for requiring Complainant to see Dr.
work Johnson: I find that Complainant had reported that he had
that medical problems, was taking medication, was under stress,
was fatigued. There is no doubt that such factors can
affect an employee's work performance. Here, Complainant's
performance was, in fact, below average. Therefore, I find
FPL met its burden to articulate a valid reason for directing
Complainant to see Dr. Johnson.

was Finally, FPL has articulated a legitimate,
nondiscriminatory reason for discharging Complainant, which
with insubordination on two occasions. Because insubordination is
grounds for discharge, I find that, FPL has met its burden
respect to all of the actions it took towards Complainant.

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prove Because FPL articulated legitimate, nondiscriminatory
but reasons for its actions, Complainant, to prevail, has to
pretextual. that the reasons proffered by FPL were not its true reasons,
instead, were pretexts. I find that Complainant did not
establish that the reasons articulated by FPL were
giving Complainant did not establish that the reasons stated by the
Company for giving Complainant more frequent reviews, for

Complainant a 90% rating on his July 30th review, for requiring Complainant to see Dr. Johnson, or for discharging him were unworthy of credence. In this case, Complainant bears the ultimate burden of persuasion. I conclude, however, that Complainant failed to establish even a *prima facie* case of discrimination or retaliation, nor did he establish pretext on the part of the FPL.

Complainant contends that FPL retaliated against him for raising safety concerns. Based on a review of the record evidence and an assessment of the witnesses' credibility, it is clear that Complainant failed to prove his case. I find that the actions taken by FPL were not motivated, even in part, by any alleged protected activity of Complainant. Therefore, this is not a dual-motive case. Accordingly, FPL was not required to show that it would have taken the same actions even if Complainant had not engaged in any protected activity.

Although Complainant alleged that FPL retaliated against him, it would not be unreasonable to infer that Complainant was trying to put pressure on the Company in order to receive higher ratings on his performance evaluations.

Complainant alleged, *inter alia*, that FPL retaliated against him for pursuing tasks which he felt were critical to nuclear safety such as replacement of the pressurizer pressure transmitters and the ERDADS isolation project. Significantly, in the fall of 1990, Complainant did not complain to FPL management, NSS, or the NRC about any alleged retaliation in connection with those projects. Complainant's position at the hearing was that disagreements over replacement of the transmitters and disagreements about other projects were major disputes in the

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department. However, the evidence established that such engineering disputes occur frequently in the department, and when a decision is made, employees simply move on to the next concern. TR 180, 374, 916, 952-953, 954-955, 990-991. Mr. Tio, who was

called as a witness by Complainant, testified that
disagreements
on technical issues were commonplace. TR 367, 371-373.

Complainant complained in February of 1991 when he
received
his annual review with a below average overall rating. RX
11.
He then composed a seven page letter to Mr. Hosmer blaming
the
low rating on a laundry list of alleged wrongs. He claimed
that
the review violated the equal employment opportunity laws and
his
civil rights "as a member of the Cuban-American minority."
RX 12
at p. 1. He claimed that the review also violated "basic
procedural requirements." RX 12 at p. 1. He referred to his
fitness-for-duty protest and stated that his low rating may
be a
violation "of my constitutionally guaranteed right to free
speech
and expression." RX 12 at p. 1.

Complainant discussed alleged violations of his rights,
and
then pointedly stated that his attorney was aware of his
fitness-
for-duty protest. Complainant then stated the following:

At present, sir, I regard this incident of my
evaluation, optimistically as an isolated event
that the Company only endorsed in omission by
failure to prevent it from occurring. This is
with the expectation that an equitable retraction
take place and a fair revised evaluation be
completed. RX 12 at p. 2

Complainant did succeed in having his overall
performance
rating increased to 100% Significantly, having then obtained
what he wanted, Complainant did not go to the NRC or NSS with
any
supposed nuclear safety concerns, or to the EEOC with any
claim
of ethnic discrimination.

At the time of Complainant's April 30th review,
Complainant
still had not taken any alleged nuclear safety concern to
either
the NRC or NSS. However, on April 30th, Mr. Hosmer attended

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Complainant's review session, and Complainant received
another

90% rating. Significantly, Complainant admitted on cross examination that he may not have gone to NSS if he had received a 100% rating. TR 274, 343.

Complainant received another 90% rating on his July 30th review. At this session, Complainant was directed to submit to a psychological fitness-for-duty evaluation. Complainant failed to attend the first scheduled meeting with the psychologist. Complainant then advised supervision that he was taking his alleged nuclear safety concerns to the NRC. In addition, Complainant's attorney intimated to the Company's attorney that there were other nuclear safety issues which Complainant had not yet revealed.

Notwithstanding these events, Complainant was discharged when he again failed to attend the appointment with Dr. Johnson on August 19, 1991.

Employer contends and I agree that it is ironic that someone who claims to have safety concerns would balk at the requirement that he be evaluated in the interest of nuclear safety. Complainant's attempt to intimidate the Company by bringing, and threatening to bring, concerns to the attention of the NRC and to NSS is clearly a misuse of the employee protection provision of the ERA. The employee protection provision of the ERA is an important part of that Act. Its aim is to avoid a catastrophe by encouraging employees in the nuclear power industry to report perceived safety violations in good faith without fear of retribution. See, e.g., *Rose v. Secretary of Labor*, 800 F.2d 563, 565 (6th Cir. 1986) (concurring opinion of Senior Circuit Judge Edwards). The real protections provided by the "whistleblower" provision are made trivial when an employee whose performance is declining threatens to raise alleged nuclear safety concerns as a device to have management give him higher performance ratings.

I find that the actions taken by FPL demonstrate that the Company was not discriminating or retaliating against

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Complainant. Instead, the Company was trying to help an eleven-year employee in whom it had a lot invested. TR 800.

I agree with Respondent and I find that if the Company was retaliating against Complainant because he advocated certain projects or because of his contacts with NSS and later with the NRC, it is unreasonable to believe the following actions would have been taken: (1) move Complainant to PEG where his job assignments would more closely match his principal strength which was in I&C design development rather than oversight functions; (2) give Complainant the assignment of drafting a training manual on the new Westinghouse setpoint methodology for the Turkey Point Plant and also teaching a course on that methodology; (3) increase the overall rating on his 1991 annual performance appraisal; (4) counsel him on several occasions to take advantage of the Company's EAP; (5) provide him, at his request, a draft of a written performance improvement plan to help him improve his performance to a 110% level; (6) provide him with periodic feedback as to his job performance to help him improve; (7) tell Mr. Barrow that Complainant was a good employee whom the Company did not want to lose; (8) encourage Mr. Barrow to meet with him; (9) afford Complainant time off from work to attend numerous sessions with Mr. Barrow; (10) switch Complainant's performance reviews from monthly to quarterly at his request; (11) provide three full days of red badge training to him just two weeks before his July 30th review; (12) send Complainant to a stress management seminar during work time; (13) write goals for Complainant to improve his performance in four areas on his July 30th review; (14) permit Complainant's attorney to attend the July 30th review session; (15) postpone the psychological evaluation (originally set for July 31st) to August 2nd at the request of Complainant's attorney; (16) suggest to Complainant that he take two days off from work before the psychological evaluation so that he would be rested for the session; (17) explain the appeal process to Complainant in writing; (18) give

him a second chance to take the psychological evaluation even
though the Company could have terminated him for
insubordination
after his first failure to see Dr. Johnson; and (19) not
reject,
out of hand, the conditions he requested in connection with
the
psychological evaluation, but consult with Dr. Johnson
regarding
those conditions. Accordingly, it is concluded that the
Complaint, as amended, is without merit.^{13/}

RECOMMENDED ORDER

For the reasons stated above, it is recommended that
the
instant Complaint, as amended, be dismissed in its entirety.

ROBERT G. MAHONY
Administrative Law Judge

Dated:
Washington, D.C.

Motion

13/ Complainant's Supplemental Memorandum of Law dated
September 14, 1993 is received and is part of the record.
to Strike is denied.
